Supreme Court of the United States

OCTOBER TERM, 1930.

No. 407.

C. A. WEED & CO.,

Plaintiff-Appellant,

against

STEPHEN T. LOCKWOOD, as United States Attorney for the Western District of New York,

Defendant-Appellee.

APPEAL FROM FINAL DECREE OF DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK, DISMISSING BILL OF COMPLAINT.

BRIEF FOR PLAINTIFF-APPELLANT.

SIMON FLEISCHMANN,
EDWARD I. JELLINEK,
MARTIN CLARK,
JAMES O. MOORE,
JOHN W. RYAN,
Counsel for Plaintiff-Appellant.

INDEX

TABLE OF CASES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT,

ON THE CONSTITUTIONALITY OF SECTIONS 1 AND 4 OF THE LEVER ACT, AS AMENDED OCTOBER 22, 1919.

This cause comes before this Court upon the appeal of plaintiff corporation from the decree, dismissing its Bill of Complaint, and denying its prayer for an injunction, restraining the U. S. Attorney for the Western District of New York, from enforcing Sections 1 and 4 of the Lever Act, so called, as amended on October 22, 1919, upon the ground that said provisions are uncontsitutional and that the U. S. Attorney is exceeding his power and authority in seeking to enforce the same and in securing indictments thereunder.

The objections of this particular plaintiff are aimed acutely against the provisions of the Act, making it unlawful for any person wilfully to make an unjust or unreasonable rate or charge in handling or dealing in wearing apparel.

The Act, as originally passed in 1917, did not include a prohibition against the sale of wearing apparel, the provision in regard to wearing apparel being made, for the first time, in the subsequent Act of Congress of October 22, 1919.

This appeal presents for adjudication the questions of the constitutionality of the said Sections 1 and 4 of said Lever Act, as amended; whether the U. S. Attorney has exceeded his power in causing an indictment to be found, and threatening others pursuant to said Act.

To avoid a possible misapprehension, the attention of the Court should be called to the fact that the recent convicttion of Weed & Co., in the U. S. District Court in Syracuse, has no reference to the defendant C. A. Weed & Co., in the present suit, the former being a separate corporation, engaged in business at Binghamton, N. Y., and having no business connection with the defendant, C. A. Weed & Co., whose place of business is at Buffalo, N. Y.

Statement.

As the bill was dismissed in the Court below upon its allegations and in the absence of any answer by defendant, its allegations of fact must be accepted upon this appeal.

Detroit United Railway vs. Detroit, 248 U. S. 429.

The allegations of the Complaint are substantially as follows:

Plaintiff is a New York corporation, engaged in the retail clothing business at Buffalo, N. Y., which business it has been conducting for twenty years; has established a wide and favorable reputation; has a numerous circle of customers and a well established trade, and owns property and assets and a good will; and has an investment of large value; and has on hand a large stock of wearing apparel acquired and carried at great cost;

No combination exists among plaintiff and others to fix or affect the selling price of wearing apparel, and unrestricted competition exists between those dealing therein;

The President has issued no regulations or orders, although authorized so to do by said Act, essential, effectively, to carry out the provisions of said Act.

The defendant U. S. Attorney presented to the Grand Jury charges against plaintiff of having made unjust and unreasonable rates and charges for articles of wearing apparel, and the Grand Jury returned an indictment of twen- two counts, charging that number of separate offenses, each count relating to the sale of a single suit of clothes, or

single garment or other article. Each of these counts is based upon an allegation that plaintiff made an unjust and unreasonable rate and charge regarding the particular article therein described, in that it sold such article for a price stated in said count, and had previously procured the same at a lesser price, likewise therein stated.

Defendant U. S. Attorney threatens to and will institute numerous further prosecutions against plaintiff for alleged violations of said act, and will file informations and procure or attempt to procure further indictments against it, and thereby and otherwise subject it to numerous and repeated prosecutions for alleged violations of said Act, and will insist that, in determining whether any particular rate or charge is just or unjust, reasonable or unreasonable, regard must be had solely to the actual original cost to plaintiff, and that the present market value thereof cannot be taken into consideration.

For several years last past, and, in particular, recently, the actual cost to plaintiff of wearing apparel has been rapidly and frequently advanced and plaintiff has in stock numerous articles of the same kind and quality acquired at greatly differing costs, and the actual fair market value of such articles since they were placed in stock has materially and rapidly advanced, and such increments in value are the private property of plaintiff, in the benefit and enjoyment of which, he is protected by the Federal Constitution.

If the price of specific articles must be fixed solely with reference to the actual original cost thereof, instead of their subsequent fair market value, the result will be that many articles, exactly alike in kind and quality, purchased

at different times, will have to be sold at wholly different and widely divergent prices not only by a given merchant as to goods in his stock, but as to such prices compared with those of all other merchants, producing a situation rendering it wholly and absolutely impossible properly, or at all, to conduct or continue in the business of merchandising wearing apparel, and producing a confusion totally destructive of the business, and likewise depriving plaintiff of property without due process of law.

The defendant U. S. Attorney claims and insists that each sale, at retail, of any article of wearing apparel constitutes, or may constitute a violation of said Act.

The Act does not provide, nor has there otherwise been in any way established a standard by which to determine whether a given article or charge is just or unjust or violative of said Act.

The President of the United States has issued regulations and orders applicable to certain articles and commodities, likewise referred to, in said Act, other than wearing apparel, whereby specific prices were prescribed which persons dealing therein were authorized to charge, and which regulations and orders enabled persons dealing therein to determine whether they were obeying or disobeying the law, which is impossible under the provisions thereof relating to wearing apparel, in the absence of rules or regulations by the President relating thereto.

Since the finding of the indictment above referred to, the defendant U. S. Attorney has caused the Treasurer of plaintiff, again, to appear before, and to be examined by the Grand Jury as to sales other than those set forth in said indictment, and unless enjoined, will urge, and, if possible,

obtain further indictments upon such charges, upon what said defendant asserts to be numerous and almost innumerable violations of said Act, and defendant threatens to press such prosecutions to final conclusion and to institute and carry through a great multiplicity of like prosecutions, all to the great and irreparable damage of plaintiff.

Plaintiff pleaded not guiltly to said indictment, and has not demurred to the same.

The trial of said indictment will involve general publicity, and as the public is peculiarly sensitive to the charge of profiteering, the publicity attending such a trial will cause plaintiff great and irreparable injury and is likely to cause the ruin of its entire business and of its stockholders, as well as great loss to its creditors.

The District Judge in his charge to the Grand Jury by which said indictment was found, charged, in substance, that the Grand Jury would be warranted in finding indictments in case they found, from the evidence, that persons had sold a single article of wearing apparel at a price above the cost thereof, which they deemed an unjust or unreasonable rate or charge, and the indictment against plaintiff was clearly based on that interpretation of the law, and said charge deprived the Grand Jury of the right to consider, and they did not take into consideration the market or replacement value of the articles mentioned in the indictment.

Various banks, holding negotiable paper of plaintiff for loans or on discount, to the extent of many thousands of dollars, will be likely to become apprehensive, and to crowd plaintiff fro payment, and refuse the renewal of its in-

debtedness, should the publicity attending the trial be had and such course would be likely to ruin plaintiff's business.

The retail clothing business, during the few weeks preceding the beginning of this suit, has been exceptionally dull, owing, in part, to the profiteering agitation, and to other causes such as the railroad strike, the threatened wearing of overalls, and old clothing, and any further elements of disturbance of the clothing industry and business is certain to prove disastrous to plaintiff and others engaged in like business.

The bill of complaint then alleges that the said Act of Congress, so amended, is unconstitutional for the reasons and under the provisions of the Constitution, specified in the complaint, and which will be considered under the assignment of errors, and the points argued under appropriate headings in this brief.

The complaint alieges the following further facts, among others:

The defendant U. S. Attorney insists that, under the Act, he has the right, through his agents and their representatives to enter plaintiff's place of business, to investigate its books and records and otherwise to interfere with and impede the conduct of plaintiff's business in an orderly and proper manner, and thereby greatly to annoy and harass plaintiff and its officials and employees, and to inflict upon it great and irreparable injury, all of which defendant threatens and will continue to do, unless restrained by this Court.

Further proceedings against plaintiff for alleged violations of said Act, irrespective of the ultimate result of trial, will inflict upon plaintiff great, irreparable and immeasurable damage and injury, subject it to public odium, divert from it and take to others in the same situation, except that they have not yet been publicly attacked, business which plaintiff would otherwise enjoy, and thereby greatly diminish, if not utterly destroy its established business and good will.

Plaintiff then asks a decree that the defendant U. S. Attorney be permanently restrained and enjoined from taking any further proceedings under said indictment, or from instituting any further hearings before the Grand Jury, looking to the finding of any further indictments against plaintiff under said Lever Act, and for other incidental and general relief.

ASSIGNMENT OF ERRORS.

The decree of the District Court, from which the appeal is now before the Supreme Court, appellant claims and alleges is erroneous, in the following particulars:

1. In that, the District Court, as matter of law, dismissed the complainant's bill and refused the permanent injunction prayed for, and held, as matter of law, that the complainant was not entitled to the injunctive relief prayed for.

2. In that, said decree of the District Court necessarily involves the determination by the District Court that Sections One and Four of the Lever Act, as amended in October, 1919, and in particular as said Act purports to

apply to the handling of and dealing in wearing apparel, are constitutional and within the general or war powers vested in Congress, and not violative of the following provisions, or any or all of them, of the Federal Constitution:

(a) Article I, Section 9, Sub-division 3, in that said provisions of said Act constitute an ex post facto law.

(b) Article VI, of the Amendments to the Constitution, in that, said provisions of said Act do not inform the complainant, or anyone else accused thereunder of the nature or cause of the accusation, and said provisions are vague, indefinite and uncertain, and do not define with sufficient accuracy or definiteness, the crime or offense for which they provide punishment, so that a person or corporation can determine whether he, she or it is violating said provisions, nor define any determinable crime whatsoever, and therefore, do not, and did not inform this complainant of the nature or cause of the accusation against it.

(c) Article V, of the Amendments to the Constitution, in that said provisions deprive complainant of liberty and property without due process of law, and take its property for public use without just compensation, and is unjustly, unreasonably and unlawfully discriminatory and arbitrary in its attempted classification of certain persons and pursuits whom are exempt from the operation thereof.

(d) The provisions of the Constitution dividing and assigning the three departments of government into the legislative, executive, and judicial, in that they delegate to the judicial and executive powers of the Government powers conferred by the Constitution solely on the legislative branch.

(e) Article VIII of the Amendments to the Constitution, in that said provisions impose excessive fines and inflict cruel and unusual punishments on those found guilty thereunder.

(f) Article X of the Amendments to the Constitution, in that said provisions assume to confer powers on the United States reserved to the States or to the people thereof, and not prohibited by said Constitution to the States.

(g) Article I, Section 8, of the Constitution, in that said provisions assume to confer or to continue the war powers of Congress in respect to the matters which are the subject of said legislation and powers over which, were never conferred by the Constitution upon Congress even as war measures, and further in that, the state of war which might have authorized the exercise of such powers by Congress, had ceased and terminated long prior to the enactment of said provisions.

3. In that, said decree involves a determination by the District Court, that it was not necessary for the President to issue any regulations or orders essential effectively to carry out the provisions of said Lever Act, as regards proper rates or charges in handling or dealing in wearing apparel, either under the provisions of Section 1 or Section 5 of said Act, and in holding, that said Act and its penal provisions became operative without such regulations or orders.

4. In that, said decree involves the determination of the District Court, that the defendant, the U. S. Atorney, did not, and does not exceed or transcend his authority in

prosecuting and threatening further to prosecute Appellant under said provisions of said Lever Act, and under the indictment referred to and others threatened, described in the bill of complaint.

THE LAW.

I.

SECTIONS 1 AND 4 OF THE LEVER ACT, AS AMENDED, ARE SO VAGUE AND INDEFINITE AS TO BE VIOLATIVE OF THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION, AND ARE, THEREFORE, VOID.

As this vital point, and the authorities thereon, will be argued and considered with great fullness by counsel for some or all of the other parties, whose cases have heretofore been advanced for argument, Counsel for the Appellant herein, to avoid duplication, or rather multiplication, of argument, and briefing on the same points, will content themselves with the mere citation of the leading authorities upon which we rely on this point, and an analysis of the authorities relied upon by the Government to sustain its claim of the validity of the Lever Act, and such original suggestions and considerations, as they deem pertinent upon this point.

Among the leading and controlling authorities sustaining our contention on this point, we beg leave to cite the following:

International Harvester Co. vs. Kentucky, 234 U. S., 216;

Collins vs. Kentucky, 234 U. S., 634;

U. S. vs. Brewer, 139 U. S., 278-288;

Railway vs. Dey, 35 Fed., 866;
Tozier vs. U. S., 52 Fed., 917;
Louisville & Nashville R. R. Co. vs. R. R. Commission, 19 Fed., 679-691;
Louisville & Nashville R. R. Co., vs. Commonwealth, 99 Ky., 132;
U. S. vs. Reese, 92 U. S., 214;
Czarra vs. Board of Medical Examiners, 25 Appeal Cases, Dist. of Col., 443;
Hocking Valley Ry. vs. U. S., 210 Fed., 735-743;
U. S vs. Capitol Co., 34 App. Cas., D. C., 599.

See also opinions of U. S. District Judges who have held the Lever Act unconstitutional, by reason of its vagueness and indefiniteness, and which opinions will be submitted to this Court.

The cases cited by the Goverment in the Courts below, and which will, doubtless, be repeated in the Supreme Court, in support of its claim that the provisions of the Lever Act referred to, are sufficiently definite to make it constitutional, are to be clearly distinguishable from the Lever Act, as an analysis of these authorities will demonstrate. One of the leading authorities so relied upon by the Government is that of *Nash vs. U. S.*, 229 U. S., 373, in which this Court held valid the penal provisions of the Sherman Anti-Trust Act, prohibiting conspiracy in restraint of and to trade.

There is a clear distinction showing the inapplicability of the *Nash* case to the instant statute.

The Government claims that, under the Sherman Anti-Trust Act, a person may be convicted, only in case it is found that the acts and combinations of the accused tend

unduly to restrain trade and that the jury is required to pass upon the reasonableness or unreasonableness of the restraint of trade attempted by the trust, which one jury might regard as criminal and another as innocent. Thus, it is asserted, there is as much peril to the trader engaged in interstate commerce as to whether he is committing the crime condemned by the Sherman Anti-Trust Act, as there is with a merchant who charges a price for his wares; that is, *reasonableness* or *unreasonableness*, and both cases must be determined by the jury.

It may be aptly *noted* here, that the statement of the proposition condemns the reasoning. The instant statute prescribes a new offense, unknown to the common law, whereby the jury must pass upon the reasonableness of a *price*, or of a profit, as claimed by the Government, without any standard indicated. The jury approves or disapproves of the "res," the ultimate fact according to their belief. On the other hand, the Sherman Act restates a common law offense, and the jury determines from all the facts and circumstances, the "res," the ultimate fact, viz: whether the monopoly unduly restrains trade as the common law has defined "undue restraint of trade" and not according to their belief of the reasonableness or unreasonableness of the restraint. This will be more fully explained hereafter.

Unless the *Nash* case upholds, in every respect, the Government's broad claim, it cannot be gainsaid that there is no authority in support of the constitutionality of the instant statute and that it is clearly violative of the Fifth and Sixth Amendments to the Constitution.

What then does the *Nash* case decide? The same objections were urged to the criminal enforcement of the Sherman Anti-Trust Act, as are here urged, and the same are stated on page 377 of Justice Holmes' decision, and he points out, that it is no objection to a criminal statute that the jury may be called upon to estimate "some matter of degree"; that a man's fate may depend upon his estimating correctly or rightly this matter of degree, as the jury subsequently may estimate it; and if his judgment is wrong, he may incur the penalty.

What is there said, is taken bodily by Justice Holmes from *Commonwealth vs. Pierce*, 138 Mass. 165, (that opinion having also been written by Justice Holmes).

In the Massachusetts decision, a physician was convicted of manslaughter for causing the death of a patient "by gross and reckless negligence." It was a case of "foolhardy presumption" in the application of a remedy. The case aptly illustrates a "matter of degree" where there is a standard as "of skill and learning * * * assumed" by the physician in undertaking the treatment. Following the discussion taken from the Massachusetts case, that branch of the argument is suddenly dropped without applying it to the merits, and beginning at the bottom of page 377, Justice Holmes said:

> "But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 88, where Justice Brewer's decision and other similar ones were cited in vain."

Thus, the decision in the *Nash* case is based almost entirely on the *Waters-Pierce* case and to that authority, we must resort to learn the real ground of the decision in the *Nash* case.

In the Waters-Pierce case, the statute of Texas denounced contracts and arrangements "reasonably calculated to *fix* and regulate the *price* of commodities, etc." and acts which "tend to accomplish" the prohibited results.

The same objections were raised to that statute as are here urged, and the same are stated by Justice Day in his opinion. Some of the cases cited were urged as condemnatory of the Texas act and are noticed by Justice Day, viz: the *Tozer* case, *Chicago & N. W. R. Co. vs. Day*, and *Louisville & N. R. Co. vs. Kentucky*, 99 Ken., 132.

Justice Day did not deny the authority or the doctrine enunciated in these cases, but stated that the Texas statute did not give to the Court or jury the broad power to determine the criminal character of the act in accordance with their belief as to whether it was reasonable or unreasonable, saying:

> "But the Texas statutes in question do not give the broad power to a Court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited." (p. 109.)

The justice then proceeds to show, that the statutes in question did not involve a consideration by the jury as to whether the acts were reasonable or unreasonable. He points out, that it is not uncommon in criminal law to punish not only completed acts but also acts which tend to bring about the prohibited result. Illustrative, of this, is the law of conspiracy under which Courts have held it unnecessary that the object of the conspiracy be effectuated, provided there was the unlawful agreement and an

overt act in furtherance of it, and under the Anti-Trust Act and the common law, a mere confederation and agreement without any overt act. The Justice bases his decision upon the ground that, if the acts complained of tended to fix and regulate the prices of commodities or were part of a conspiracy to accomplish this result, then the statute was violated.

Continuing, the Court said:

> "As to the phrase 'reasonably calculated' what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result would be accomplished?" (p. 110.)

It is clear, therefore, that under the Texas statute, as explained by Justice Day, the Court or jury were not called upon to determine whether a given act or acts were reasonable or unreasonable, but, on the contrary, whether the proven acts taken as a whole did fix and regulate the prices of commodities or were intended, tended, to accomplish that result. This, of course, presents a matter of degree; there is the recognition of two extremes, the obviously illegal, and the plainly lawful. There is a gradual approach, and the complexity of life makes it impossible to draw a line in advance.

Thus it will be perceived that in the *Waters-Pierce Oil*, it is expressly disclaimed by the Justice writing the opinion, that the Court and jury are given the power to determine the criminal character of the act in accordance with their belief as to whether "it is reasonable or unreasonable."

It has already been observed, that the *Nash* case was decided upon the authority of the *Waters-Pierce* case. Granted then, that the *Nash* case is decided upon the authority of the *Waters-Pierce* case, (it must be as the Court said so), it follows that the *Nash* case is not an authority in support of the validity of the instant statute, because its holding, as ascertained from the *Waters-Pierce* case, is, that the Court and jury are not given the power to determine the criminal character of the act in accordance with their belief as to whether "it is reasonable or unreasonable."

That this is so, is further emphasized by a consideration of the meaning of the Anti-Trust Act from which it may be ascertained what are the functions of the Court and jury. Does the Anti-Trust Act require, in a criminal prosecution, that the jury shall determine the criminal character of the acts in accordance with their belief as to what is and what is not reasonable restraint of trade? This question can be correctly understood only by reference to *Standard Oil Co. vs. U. S.*, 231 U. S., 1, and the *Tobacco Co.* case, 221 U. S., 106.

Sections 1 and 2 of the Sherman Anti-Trust Act, explicitly condemn every contract and combination in the form a trust, or otherwise, or conspiracy, in restraint of trade, etc., and subject to penalties every person who should monopolize or attempt to monopolize or conspire with others to monopolize, any part of the trade or commerce among the States, etc. The language of the statute condemned every form of agreement and all acts which restrained or tended to restrain trade, irrespective of whether the restraint was reasonable or unreasonable.

Chief Justice White interpretated the statute to mean *undue restraint* of trade. Note now the argument upon which this interpretation is based. Beginning at page 41 of the opinion, the Chief Justice reviews the history of monopolies and engrossing. A monopoly was a grant by the King to a person or persons to act as the manufacturer or middleman. It is pointed out in the course of history, how, by a great public outcry, the granting of monopolies was abolished.

It is of the greatest importance to *note here*, what the objections against monopolies were, and what the evils from the practice were, because they are the foundation of all laws against restraint of trade. It is a statement of the evils which are sought to be prevented, by condemning all agreements and combinations in restraint of trade. Justice White said:

> "The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the prices and thereby injure the public. (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article, which it was deemed was the inevitable resultant of the monopolistic control over its production and sale."

When the power to grant monopolies was denied, statutes were enacted against engrossing, because it was thought that engrossing (the middleman dealing in necessaries), tended to the same evils as those resulting from the granting of monopolies.

In time, the differences between monopolies and engrossing were lost in the popular mind and the term "monopoly" and "undue restraint of trade" came to mean the same things. Subsequently, as the conditions of society changed and trade expanded, it was appreciated that all dealing, wherein there was some restraint on trade, were not necessarily baneful, but on the other hand, some contracts, in restraint of trade, tended to stimulate trade.

The statutes then against monopolies and engrossing were repealed in England and freedom of trade became universal, with the sole restriction that acts and contracts, only, which tended to the evil consequences of monopoly, namely: (1) the power to fix the price and thereby injure the public; (2) limitation on production; and (3) the deterioration of the quality of the article were condemned.

In due time, both in England and in this country, contracts or acts thought to accomplish any of the baneful consequences above noted came also *in a generic sense* to be spoken of and treated "as restraining the due course of trade and therefore as being in restraint of trade." (See page 57 of the opinion.)

When Congress enacted the Sherman Anti-Trust Law, it used the term "restraint of trade" in this generic sense.

So it comes about, that the acts and contracts condemned by the statute are such, only, as (1) may enhance the price of commodities in interstate trade; or (2) as may deteriorate the quality of the product; or (3) such as may limit the production of the commodity.

These are the evils at which the statute and all acts and law against trusts and monopolies are directed.

Here comes in the application of the celebrated "rule of reason," enunciated in this case. On page 60 of the opinion, Chief Justice White points out that general language is employed in the statute and that all contracts and acts which restrain trade, are forbidden, and it is required,

> "That some standard should be resorted to, for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated."

Granting that the statute requires a standard, it is said:

> "It follows, that it was intended that the *standard of reason which had been applied in the common law and in this country*, in dealing with subjects of the character embraced within the statute, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

In its intent, purpose and scope, the statute prohibited contracts and combinations which so interfered with competition, that (1) prices might be enhanced; o r(2) the quality of the product deteriorated; or (3) the quality of production limited.

This and this only did the statute inhibit.

Given this as the law, and given a state of facts, the Court is called upon to exercise reason, as employed in the common law of both England and of this country and to determine by such reason, whether the acts and contracts, if true, tended to any of the three evil consequences named.

On page 62, Justice White further said:

> "It becomes obvious, that the criterion to be resorted to, in any given case, for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy, which its restrictions were obvously enacted to observe."

Note here that there is a standard of law. The common law has determined what is undue restraint of trade and in determining whether particular acts and contracts are offenses, reference must be had to the standard fixed by the common law. There is no common or other law as to what is an unreasonable charge for wares. And herein comes the distinction noted in the cases heretofore cited between statutes defining offenses known to the law and statutes prescribing new offenses, unknown to the law. The latter must be more explicit and certain in terms and leave nothing to doubt or conjecture.

On page 63, answering the argument of the Government that the statute applied to every contract or act in restraint of trade, it is pointed out that this is error because it assumes the matter to be decided. That is to say, the statute is in general terms and it is obvious that judgment must in every case be employed in order to determine (1) whether particular acts are embraced within the statutory classification, and, if so, (2) whether, those acts restrain trade within the intendment heretofore applied, namely, a restraint which may cause (1) an enhancement of prices, or (2) a deterioration of quality, or (3) limitation of production. The standard of reason is therefore the common law.

Otherwise, the Court concludes, the statute could not be enforced by reason of uncertainty. Then were considered certain cases which the Government cited as being opposed to the doctrine, adopted by the Court, and the Chief Justice points out that, in every one of those cases, it was necessary for the Court to apply the standard, namely, *reason*, to ascertain whether the acts and contracts came within the terms of the statute.

The Chief Justice then proceeded to consider the facts of the case, for the purpose of ascertaining whether those facts did come within the terms of the statute and whether they were directed to accomplish the baneful influences prohibited by the statute as interpreted by the Court.

And in the *Tobacco* case, beginning on page 179, the rule was again restated, and the Court proceeded to examine the facts for the purpose of determining (1) whether the acts and contracts came within the terms of the statute and (2) whether they were productive of the evil consequences prohibited by the statute; without which, the Tobacco Co. could not have been brought within the condemnation of the statute.

With the Anti-Trust Act thus interpreted and understood, what are the respective functions of Court and jury in criminal prosecutions under the Act? Clearly this; the first consideration is for the Court to determine by the standard of reason, as understood and explained by the common law, whether the acts and contracts did come within the terms of the statute. This is clearly a question of law. Then the truth of the facts is clearly a question for the jury. The third question is perhaps a mixed question of law and fact, namely: do the acts and contracts

found by the jury to be true and determined by the Court to be within the terms of the statute, give to the accused such an advantage or control of the trade that (1) they may enhance the price of the commodity; or (2) deteriorate the quality, or (3) limit production?

Thus, it is perceived that the jury is not called upon to determine whether the acts and contracts are reasonable or unreasonable in accordance with their belief, but on the contrary, whether the acts and contracts are in fact true and whether if true, competition is so restricted that the evil consequences forbidden necessarily may result.

Throughout there is a standard, granting that the acts and contracts are within the terms of the statute, and the jury only determines whether the accused have *restrained* trade and commerce in such a manner as to cause the evils prohibited; that being the standard.

Observe, now, wherein comes the matter of *degree* alluded to in the *Nash* case. There are the two *extremes*, namely: (1) acts and contracts obviously illegal because they can have no other effect than to restrain trade in such a manner as to produce the consequences prohibited, and (2) the plainly lawful acts and contracts, which, although in restraint of trade, do not prevent competition in such a manner as to affect prices, quality or production.

Between these two as pointed out in the *Harcester* case, "there is a gradual approach" and the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be just. Between these two extremes, the acts and contracts of the accused must

be judged by the Court and jury, as to whether the same do, or do not establish such a control and advantage in trade as to enable the confederates to accomplish control of the price, production or quality of the article effected.

The question to be determined is: Do the nature and quality of the acts and contracts conduce to establish the evil conditions prohibited by the statute as construed under the common laws? This is not a question of belief. Persons who undertake to restrain trade at all are embarking upon an enterprise which they know may cause evil consequences, and for which they may become amenable to the criminal law.

So, the driver of an automobile passing through a crowded thoroughfare, where the rights of others, under the Common Law, are necessarily in peril of impairment must realize the danger. He may believe that he is acting carefully, but his conduct must be judged by the common law standard, and it is a matter of degree between negligence and due care as defined by the common law, as it is a matter of degree between a restraint of trade causing injuries to the public and a restraint of trade which does not cause injury.

The cases cited by Justice Holmes in the *Nash* case were all common law offenses, as was that in the *Nash* case itself. And there lies the decisive distinction whereby the *Nash* case cannot in any sense be regarded in point.

It is new offenses, unknown to the common law, that are condemned for uncertainty by the authorities. There is no common law, limiting profits to merchants, to which resort may be had for a standard of reason or otherwise, and therefore the NASH case does not apply.

There here is no matter of degree involved. A merchant may sell his wares, and the statute indeed requires that he shall not hoard them. In so doing, he is required to undertake risks, charges and expenses, which vary in every enterprise, according to conditions and good management. He may sell his goods, under the Government's construction of this act, at a profit, but he is not advised by the law, statute or common, as to what his profit shall or may be. He is not told what his gross profit may be, or what his net profit may be, or whether he may charge any profit. The vice of the statute, in this respect, is the impossibility of ascertaining from it, with any definiteness or certainty, what the two extremes are, between an obviously lawful "rate or charge" and an obviously unlawful "rate or charge" as some of the interpretations of the statute, clearly reveals.

The clause under consideration, "or to make any unjust or unreasonable rate or charge in handling or dealing in any necessaries" has provided a variety of opinions as to its construction. The term "profit" is not used. The "rate or charge" is the thing, and the indictment informs the accused that the "rate or charge" is the price exacted. The rate or charge exacted is, therefore, condemned. How is it to be ascertained, that the price is unjust or unreasonable? Must it be, by comparing the price exacted with the general retail price prevailing among merchants doing the same class of business? Supply and demand establishes retail as all other prices for commodities in the absence of conspiracies or unlawful combinations. If the defendant's prices were shown to be greatly in excess of the retail price of other clothing merchants, then the prices it exacted might be unreasonable according to this construction.

The indictment is drawn on the theory that the price is unjust or unreasonable according to the profit made, without regard to any other considerations.

It has been observed, that the term "profit" is not used in the statute. It is read in. If "profit" is the thing, then what "profit"? Is it the difference between cost and sale price, as the Government says, without considering the cost of doing business? Or is it the gross or net profit above the wholesale price or the prevailing retail, at the time of sale? Or, is it the net profit after deducting the expense of doing business, losses, taxes, and allowing for the depreciation of the purchasing power of money?

None of these things is contained in the statute. Whichever construction is, therefore, adopted, it means the reading into the statute of something Congress did not say or perhaps intend to say. That the Court cannot read language into the statute to make it certain and constitutional, the Supreme Court has repeatedly held.

In *Trade Mark* cases, 100 U. S. 82, where the constitutionality of the law could only be sustained by reading matter into it, Justice Miller said:

> "If we should, in the case before us, undertake to make by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

Cited and followed in:

Employer's Liability Cases, 207 U. S. 463.

So, it is obvious, that it is absolutely impossible to determine, in the first instance, what reasonable profit a merchant may exact for the purpose of arriving at the first extreme, viz: the obviously legal charge. Owing to the same considerations, the obviously unjust charge, or the other extreme, can not be ascertained. So there is no matter of degree between the obviously reasonable, lawful and just charge, and the obviously unreasonable and unjust charge, because the limits of either are not capable of ascertainment from the statute or the common law, or otherwise.

The enforcement involves itself, in every instance, to the belief or opinion of the jury as to what is, and what is not a reasonable rate or charge.

Such a statute, as has been fully demonstrated, is too vague and uncertain to permit of its enforcement and is clearly in violation of the "due process of law" clause of the Fith Amendment and also of the "to be informed of the nature and cause of the accusation" of the Sixth Amendment to the Federal Constitution.

The Government may contend that later cases citing the *Nash* case show that the Supreme Court intended by the *Nash* case to condemn or to impair and limit the doctrine of the *Tozer* and kindred cases. Reference to those cases reveals that there was in every instance a standard either referable to the common law or to similar statutes and nothing was left to belief.

Miller v. Strahl, 239 U. S., 426, was a *civil* action wherein a guest at a hotel injured in a fire sought to recover damages from the inn keeper on the ground of negligence.

A statute of Nebraska imposed the highest degree of care upon an inn keeper to protect his guests in case of fire; the inn keeper being required to use "all in one's power" to prevent injury to his guests. To do "all in one's power" is but an expression of the highest degree of care; that was the standard imposed upon the inn keeper. The varying degrees of care are familiar terms and legal literature and decided cases upon the various degrees of care are voluminous. In the Nebraska statute, the inn keeper knew that he must exercise the highest degree of care. Of course, it is for the jury, under all the circumstances, to say, what is the highest degree of care, but in every case, the Court and jury have the standard of the common law to aid and guide them, as well as numerous similar statutes. Besides, the cause was a civil one and it is only to criminal charges that the constitutional objection for vagueness applies. (See reasoning in *L. &N. & R. Co. vs. Kentucky*, 99 Ky., 132.)

In *Fox v. Washington*, 236 U. S., 277, a statute, as interpretated by the Courts in the State of Washington, condemned as criminal, every person who should, by any printed matter, encourage an actual breach of law. The matter printed encouraged and incited indecent exposure. Mr. Justice Holmes points out that the statute, as construed, condemned as an offense, matters concerning which there was a considerable body of law. Therefore, as there is the standard of law respecting what constitutes the incitation or an encouragement of an actual breach of the law, there is no vagueness or uncertainty concerning the statute.

In *Omaechvarria v. Idaho*, 266 U. S., 343, there was a guide or standard in the customs and laws and experiences of the People of Idaho. The practice there condemned was the grazing of sheep on the federal domain or ranges previously occupied by cattle or usually occupied by cattle raisers. The legislation of Idaho commenced in 1875. The section was passed in 1883. The object of the statute was to prevent infractions of the peace, because clashes between sheep herdsmen and cattle herdsmen had become frequent, due to the fact that cattle cannot be successfully grazed upon the same range with sheep. The statute over thirty years after its enactment was attacked for indefiniteness, upon the ground that the law did not provide for the ascertainment of the boundaries of a range or for determining what length of time was necessary to contribute a prior occupation a "usual" time within the meaning of the act. The Court pointed out that this did not constitute any difficulty, because men familiar with range conditions would have no difficulty in determining what the boundaries were. Justice Brandeis especially points out, "that similar expressions are common in the criminal statutes of other states." Thus again the standard or guide is referable to the law.

Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed., 307, held that the act of September 26, 1914, section 5, giving the Federal Trade Commission authority over unfair methods of competition and declaring the same unlawful was not void for indefiniteness, because the words, "unfair methods of competition" were not defined. "Unfair competition," however, has from time immemorial been considered by the law as a wrong. And as a consequence there is a considerable body of both statute and

common laws upon the subject, and the Court expressly points out that Congress had in mind that this body of common law and statutes were to control. As Circuit Judge Baker said:

> "The trader is entitled to his day in court, and there the same principles and tests that have been applied under common law or under statutes of the kinds hereinbefore recited, are expected by Congress to control." p. 314.)

Thus, from all the cases above cited, it will be perceived that general terms were employed in the statutes and that in each instance the general terms employed possessed a *law meaning*, either by use in statutes or by the common law, or by both, and the general terms thus employed were controlled by the body of the law and the statutes upon the same subject.

None of the cited statutes contain the faults of the Lever Act. The inherent vice here lies in the fact that every merchant, who sells a garment, is liable to indictment. Congress has "set a net large enough to catch all possible offenders and leave it to the Court to step inside and say who could be rightfully detained and who should be set at large." (Chief Judge Waite in *U. S. v. Reese, supra.*)

So, juries may sit in judgment upon all wearing apparel merchants and relieve or condemn them in accordance with the various beliefs of the respective juries.

There are no limitations by which the matters of degree may be invoked. If it was known, what was an obviously lawful charge and what was an obviously unlawful charge, then the matter of degree between the two would obtain and would constitute a proper consideration for a jury and

this is what the *Nash* and kindred cases mean and hold.

As demonstrating, one may fairly claim, quite conclusively, the vagueness, indefiniteness and uncertainty of Section 4 of the Lever Act and its meaning and proper application, attention may be called to the varied, divergent and irreconcilable interpretations that it has already received at the hands, or rather minds of various U. S. District Judges, in cases which have already come before them, and in some of which, the defendants have been severely punished both by fine and imprisonment, and in others of which they have been discharged upon the express ground that the law was unconstitutional because of its vagueness and uncertainty, and its consequent violation of the Sixth Amendment of the Constitution.

In *U. S. vs. Leonard,* District Judge Howe of the Northern District of N. Y., held that in determining whether or not a price was unreasonable, the jury should take into consideration *"what prices the defendants paid for the goods in the market*—whether they bought them in the ordinary course of trade, paying the market price at the time, the length of time defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, *but not how much the market price had advanced from the time the goods were purchased to the time they were sold."*

In *U. S. vs. Oglesby Grocery Co.,* District Judge Sibley of the Northern District of Georgia, said:

> "The words used by Congress in reference to a well established course of business *fairly indicate the usual and established scale of charges and prices in peace*

times as a basis, coupled with some inflexibility in view of changing conditions. The statute may be construed to forbid in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer."

Judge McCall of the Western District of Tennessee, in his charge to the grand jury, stated that, if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at $8 per pair and the second lot after the price had gone up to $12 per pair "and then he sells both lots of those shoes at eighteen dollars, he is profiteering clearly upon the first lot of that only cost him $8. Now he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the twelve dollar shoes."

In *U. S. vs. Myatt,* District Judge Connor, of the Eastern District of North Carolina, said:

"It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit upon sugar. The profit made is not the test, and may be entirely irrelevant to the guilt of the defendant—he may within the language of the statute make an unreasonable and, therefore, unlawful 'rate or charge' without making any profit, or the rate or charge made may involve a loss to him upon the purchasing price."

District Judge Hand, of the Northern District of N. Y., in his charge to the grand jury, said:

> "Furthermore, it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit—not to him, but if established generally in the trade. The law does not mean to say that all people shall charge the same profit. If I am a particularly skillful merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much am I allowed. But if I am charging more than a reasonable price, taking the industry as a whole, I am not allowed to keep that profit because on other items I am sustaining a loss."

In *U. S. vs. Goldberg*, District Judge Bledsoe, of the Southern District of California, charged the jury that, in passing on the question of the reasonableness of prices for sugar the jury should take into consideration, among other circumstances, the following:

> "That there was, if you find that there was, a market price here in the community or generally with respect to the profit that normally should be made upon sugar sold either by manufacturers or jobbers and retailers."

In *U. S. vs. Culbertson, etc. Co.*, District Judge Rudkin, of the Eastern District of Washington, on the trial of defendant on July 8, 1920, charged the jury, among other things, that as a matter of law, defendant was entitled to sell its goods on the basis of the actual *market value* at the time and place of sale over and above the expense of handling the goods, and a reasonable profit, and that the original cost price became immaterial, except as it threw some light upon the market value.

Under the above charge, it is gratifying to be able to note that the jury promptly acquitted the defendant, but what possible hope of acquittal could the defendant in some of the other cases above cited have, under the diamentrically opposite interpretation of this vague, uncertain and hazy statute.

We respectfully contend, that the statute is so vague and indefinite that the alleged criminality of a given price charged by a merchant for an article, will depend entirely upon the opinion of each jury, as to whether the rate or charge is unreasonable or unjust, and that neither the Court nor the jury has or will have any standard whatsoever to guide them in their determination. The necessary result of this situation will be, that one jury may convict and another acquit upon the identically same rate charged and under like conditions and circumstances, thus making the enforcement of the law entirely capricious and arbitrary.

It is absolutelly impossible for anyone dealing in wearing apparel, especially at retail, having in mind the nature and variety of articles involved, the innumerable and constantly varying conditions under which the same must be bought and sold, to determine in advance, or to be advised by attorneys, Judges or Courts, as to what is or will be regarded by a given Court or jury, as a reasonable and fair price, and what, as an unreasonable or unfair price, or what elements will be submitted to a jury by a given Court, or construction put upon the Act, in a given case. Illustrations of this inherent and insurmountable problem and difficulty could be multiplied indefinitely, but we must content ourselves with the palpable nature of the same, the instances pointed out in this brief, and in the conflicting opinions of Courts above cited.

We venture to assert that no brain or combinations of brains, as yet evolved by civilization, can formulate what are fair or unfair, or reasonable or unreasonable prices of articles of wearing apparel in any given locality, and much less in all localities, which will stand the test of business expediency for a period extending beyond the time required for their formulation.

It may indeed be asked, upon what theory, it is supposed, that merchants or their lawyers can reach a sage determination as to prices, giving to the merchants immunity from prosecution, when the considerable number of Federal Judges who have thus passed on the questions are lined up on irreconcilable sides of the solution of this great, momentous and far-reaching problem, both as to the constitutionality of the Act itself and as to its meaning and application, if it be constitutional.

Nor need there be any great solicitude or straining after a conclusion holding the Lever Act valid and constitutional, as it is by its express terms, of only temporary duration, and is to terminate automatically at the official termination of the war, a condition already existing in fact.

Again, if there be unreasonable profiteering, the evil will not only cure itself under the workings of economic laws and competition, but its cure has already set in, as is evidenced, as regards wearing apparel, by various countermovements, such as the proposed wearing of overalls and old clothes and other influences, and the drop in prices of men's clothing which has already begun, resulting in part from over-production and from other causes.

When we consider that the words "wearing apparel" were never included in the statute until October, 1919, when hostilities had ceased for nearly a year, it must be clear, that its insertion was, in itself, ill-advised, and the result of a certain hysteria, under the pressure of which, no permanent reform is to be effected.

II.

THE PROVISIONS OF THE LEVER ACT PROHIBITING THE SALE OF NECESSARIES FOR ANY UNJUST OR UNREASONABLE RATE OR CHARGE ARE INOPERATIVE AND UNENFORCIBLE IN THE ABSENCE OF REGULATIONS AND ORDERS MADE BY THE PRESIDENT AS TO SUCH NECESSARIES AS IT IS DESIRED TO CONTROL.

Section 1 of the Act relating to necessaries provides that the President is authorized to make such regulations and to issue such orders "as are essential effectively to carry out the provisions of this Act."

It is alleged in the complaint and admitted, that the President has issued no such regulations or orders, as to wearing apparel.

The Government claims, we believe, that this would not include authority in the President to fix definite prices. It is not necessary to determine this point, technically. The President could have issued general regulations and orders creating certain limitations as to maximum profits above cost or market value on given articles, or above what is properly allowable to a merchant as a reasonable return on his entire business for a reasonable period, such as a year, and could otherwise have fixed standards for the guidance of merchants in fixing prices and profits.

The fact that the President has not promulgated any regulations or orders, leaves the Act hopelessly vague and indefinite, and leaves merchants helpless on an uncharted sea, in determining whether a given price for a commodity will be regarded by a jury as reasonable or unreasonable, just or unjust.

If the Act in question, to make it operative, calls for the making of regulations and orders by the President, giving it sufficient definiteness to enable merchants to obey it, and to avoid its violation, it becomes, in a sense, unnecessary to determine whether it is constitutional or not until the President shall have exercised the authority so conferred upon him to make such regulations and orders, "as are essential, effectively, to carry out the provisions of this Act."

As the President has never issued any rules or regulations relating to the sale of wearing apparel, it is to be conclusively presumed, that he has seen no necessity therefor, probably in view of the actual cessation of hostilities, he must be presumed to have concluded that reasonable prices either exist, in view of the diminished value of the dollar, or will be restored within a reasonable time after the promulgation of peace, under the operation of economic laws and competition which are not to be interfered with, where that can possibly be avoided.

It seems reasonably clear, and a fair construction of the Act, that Congress did not deem it practically effective or operative, in the absence of further regulations or orders from the President, and other provisions of the Lever Act conferring in some cases express authority upon the President to fix definite prices for commodities, strengthen and confirm this contention.

To sum up this point, we respectfully insist that if the Court should conclude that the President had no power to fix prices or to make regulations and orders which would establish a reasonable standard or limitations or guides by which merchants could determine whether a given price would or could be held lawful or unlawful, then the Act is unconstitutional, being in violation of the Sixth Amendment of the Constitution by reason of its vagueness and uncertainty.

If, on the other hand, the Court should conclude that such presidential guiding regulations and orders were contemplated and authorized by the Act, and could be lawfully made, then this act, if held constitutional, has never become operative as against dealers in wearing apparel, by reason of the failure of the President to make such regulations and orders, and in that view, the constitutionality of the Act, when re-enforced by such regulations and orders, need not be determined, until a case presenting the entire question shall come before the Courts, but obviously, in the meantime, the enforcement of the Act should be enjoined upon the ground that it would involve an unlawful usurpation of power by the Federal prosecuting authorities.

The view for which we contend, is fortified by Section 5 of the Lever Act, which provides that the President may license the distribution of necessaries, whenever he shall find it essential so to do, to carry into effect, any of the provisions of the said Act, and when he shall find any charge or profit of a licensee unjust or unreasonable, he shall order such licensee to discontinue the same, and the President may in lieu of any unjust or unreasonable charge or profit, find what is a just and fair profit, and in any

proceeding in any Court, such order of the President shall be prima facie evidence, and any person who fails to discontinue any unreasonable or unfair profit or practice in compliance with the President's order, shall be punished by fine and imprisonment.

> "It is an old and well recognized rule of statutory construction, that, when the act to be done concerns the public interest or the right of third persons, permissive words conferring power or authority upon public officers or bodies will be construed as mandatory."
>
> *People ex rel. Cayuga Nation vs. Land Commissioners*, 207 N. Y. 48.

> "What a public corporation or officer is empowered to do for others and it is beneficial to them to have done, the law holds he ought to do."
>
> *Mason vs. Pearson*, 9 Howard, 248.

Under Section 5, the President has issued licenses in relation to grain, milk, butter, cheese, poultry, eggs, nuts, beans, agricultural implements, oils, gasoline, tallow, glucose, starch, oleomargerine and many other articles.

Evidently, it was the intention of Congress, that, if and when economic laws failed, the President would exercise his authority to enact fair price regulations. With such regulations before him, a person included within the prohibitions of the Act might have a standard, and if he departed from it, it would be at his peril. The law, taken as a whole, including the provision for a fair price order by the president, presents a fairly comprehensive scheme which would give fairly definite standards of conduct.

The indictment makes no mention of the promulgation of such standards, and the allegations of the complaint that none have been established stand admitted, and until they are adopted, the crime of charging excessive and unreasonable prices does not, in any event, come into existence; and the United States Attorney in obtaining and prosecuting such an indictment, clearly exceeds his power and authority, and should and can be restrained therefrom in a suit in equity.

It is, indeed, a serious question whether under the Lever Act, there can be any prosecution for its violation until the requirements of Section 5 above quoted, have been put into operation. If there cannot be, then, the defendant is exceeding his authority in threatening prosecutions under the indictment found, and others that may be found, which are based solely on a charge of unreasonable and unjust prices represented by the difference between the cost and the selling price of separately given articles.

It remains clear that, if Section 5 is not applicable to violations under Sections 1 and 4, then the provisions of Section 1, itself, and contained in the body of Section 1, to the effect that the President is authorized to make regulations and orders essential effectively to carry out the provisions of the entire Act, including Sections 1 and 4, required the promulgation of guiding regulations and orders as would enable merchants to steer clear of a violation of these Sections themselves.

We have practically conclusive evidence that as the Lever Act was originally passed in 1917, it was the intention of the Department of Justice and, of Congress, which

passed the bill upon the recomendation of the Attorney General, that Section 5, above referred to, should afford the only means of enforcing the prohibitions of Sections 1 and 4 of the Act, as we find the following statement made by the Attorney General as late as April 29, 1920, to the Judiciary Committee of the House of Representatives in the hearing on the investigation of the action of the Attorney General relating to the price of Louisiana sugar, reported at page 149 of the official pamphlet of these hearings, more fully described in Exhibit B hereto attached.

> "The amendment was drafted by me. The President, in his message to Congress of August 8, 1919, had recommended that the food-control act should be amended so as to include wearing apparel among the necessaries of life which were protected by that Act, and that a penalty should be provided for profiteering, which was then made unlawful in Section 4 of the Act.
>
> During the war that unlawful act was guarded against and punished by the use of the license system, which made it possible for the Food Administration, charged with the administration of that law, to effectively control profiteering.. But with the failure of the appropriation for the Food Administration, the administration going out of business on the 1st of July, 1919, the license system fell with it; and we found ourselves with a statute against profiteering, but providing no penalty for a violation.
>
> I accordingly drafted an amendment to the food-control act providing for a penalty for profiteering, and including wearing apparel, and some containers among the necessaries of life protected by the act."

It thus follows that as the Lever Act originally stood, it was not considered sufficiently definite to make it enforcible, without putting into operation Section 5, which still remains part of the Law, and even if the Law can be constitutional, we still submit, that it could only be made definite enough for application by still requiring compliance on the part of the Government, in the first instance, with the provisions of Section 5 of the Act, which is a comprehensive licensing provision.

Moreover, Section 5 contains an express provision that it shall apply only to retail dealers whose gross sales do not exceed $100,000 per annum, and provides punishment by fine and imprisonment for its violation but there can be no violation, under this Section, without the prior obtaining of a license from the President if required and the issuing of orders by the President as to profits deemed unjust or unreasonable by the President.

This Section 5 also shows that Congress did not deem it worth while to legislate against the charging of unjust or unreasonable prices by retailers whose gross sales did not exceed $100,000 per annum, and was only to apply to the latter, after the President required the larger dealers to take out licenses, and thereafter, to violations of restricting orders as to prices and profits which the President might issue.

We respectfully contend that there is no valid reason why Section 5 should not, in any event, be still held operative, if the Act is to be regarded as constitutional, as it gives some preliminary guide to the merchants to enable them to avoid violations of the Act, which wholly disappears if Sections 1 and 4 are deemed operative irrespective of the application of Section 5.

If Section 5 no longer remains applicable to the enforcement of Sections 1 and 4, then the latter Sections are clearly so vague and indefinite as to fall within the condemnation of the Sixth Amendment of the Constitution, and as the defendant U. S. Attorney has seen fit, as is conclusively shown by the indictment in our case, to construe the amended Act as no longer requiring the application of Section 5, he has adopted what is in any event an unconstitutional construction of the Act, and his act is, therefore, void and in excess of his authority, and he should be enjoined from proceeding further.

It is also important to note, in this connection, that the provisions of Section 1 of the Lever Act, authorizing the President to make such regulations and issue such orders as are essential effectively to carry out the provisions of the Act, was in the original Act, as passed in 1917, as was also Section 5, providing for the licensing of dealers in necessaries, to which we have above referred. It was, therefore, apparently not the intention and purpose of Congress to make Sections 1 or 4 self-operative, without compliance with the provisions of Section 5, pursuant to which, alone, a situation could arise which would expose a merchant to criminal prosecution.

The addition of wearing apparel to other necessities and the repetition of the penalties by the Amendment of October, 1919, for a violation of Section 4, cannot be fairly held or construed to show an intention on the part of Congress to abrogate the provisions and the necessary application of Section 5, as a foundation for criminal prosecution, especially in view of the fact, as has just been pointed out, that the President had power to make regulations and

orders under Section 1 in the original Act of 1917, which power was not abridged or changed by the amendment of October, 1919.

The debate before the Senate Committee, set forth in Exhibit A, hereto attached, likewise shows conclusively in the statement of Senator Hoke Smith of Georgia, that when the Lever Act was first passed, it was not deemed advisable to make profiteering an absolute crime, without a prior investigation of given prices and, particularly by the President, and Section 5 was enacted, to provide this intermediate step between the profiteer and the Court, obviously a fair method of procedure, requiring as it necessarily did, a careful and deliberate investigation of the question by experts, and Senator Smith, in calling attention to the fact that the President might require the licensing of large business enterprises and that a merchant who failed to take out a license, after the President required one, and who, thereafter, violated further restrictive orders, became liable to criminal prosecution, remarks:

> "If Section 5 had been enforced there would have been no occasion for additional legislation. We did not make it a crime to charge an unreasonable profit because language of that kind cannot create a crime. It is too indefinite. It is too uncertain."

Even if Sections 1 and 4 are to be held constitutional, they may remain wholly inoperative, or partially inoperative as to wearing apparel, concerning which no regulations or orders have been made by the President, pursuant to the authority of Section 1, or to the original and continued authority of Section 5.

It is well settled that a legislative body may enact valid legislation and prescribe that it shall become operative on the happening of a specific contingency which may consist of subsequent actions to be performed by public officers, and that such a statute lies dormant until called into active force by the creation of conditions upon the existence of which it is intended to operate.

> *12 Corpus Juris*, title "Constitutional Law," p. 864, §365, and numerous cases there cited.

Even if the Sixth Amendment to the Constitution, which has been construed as requiring definiteness in criminal statutes, had never been passed, Section 4 of the Lever Act, in the absence of prices fixed by Congress, itself, or by the President, or a proper administrative body created by Congress, would be unconstitutional and violative of the Fifth Amendment, as depriving a person accused of liberty and property, without due process of law, and would also be an *ex post facto* law, for the following reasons:

The first official body to fix or determine a just or reasonable price in this situation, would be the jury, after the close of a trial. It would be impossible for an accused person to determine or anticipate what a jury in the future, and after he had fixed the price of his commodity, would regard as a fair or reasonable price. Any price he would determine upon, would necessarily be fixed by him at the time he exacted it, at his peril, and at the peril of a disagreement on the part of the jury which he could not possibly anticipate.

We submit that this situation is one strikingly illustrating a law which is both violently *ex post facto*, and, at the same time, lacks every known element of due process, and, than which, no more arbitrary, capricious or despotic type of legislation can be imagined. It is inconceivable, that such a law should have any greater validity in times of war than in times of peace.

III.

THE PROVISIONS OF THE LEVER ACT PROHIBITING THE SALE OF NECESSARIES, AT UNJUST OR UNREASONABLE PRICES, ARE UNCONSTITUTIONAL, EVEN AS A WAR MEASURE.

It may be stated, as axiomatic, that, under the Federal Constitution, no one would have the hardihood to claim that the provisions of the Lever Act, prohibiting the sale of articles of wearing apparel, at any price not satisfactory to the owner thereof, would be valid in times of recognized and official peace.

The sole justification for this vague and arbitrary legislation is asserted to be that it is a temporary war measure, and that anything goes in war for the national protection.

It is clear, however, upon anything like calm reflection, that practical constitutional protection to life, liberty and property, not only remains, at least outside of the area of actual military operations, but that it is to be more effectively maintained in times of stress and excitement, including war, and that mere emergencies or supposed necessities for the arbitrary suspension of Constitutional protection are not to be sought for or encouraged.

For instance, Clause 2, Section 9 of Article I of the Constitution, provides that the writ of habeas corpus shall not be suspended except, when in cases of rebellion or invasion, the public safety may require it. Here we have one exception to the continuous protection of this writ, from which it is clear, that the framers of the Constitution did not intend to have exeception to or exemptions from the protection of its provisions, created by implication. There are no such express exceptions to the Fifth Amendment, prohibiting the taking of life, liberty or property, without due process of law, nor of private property for public use, without compensation; nor of the Sixth Amendment, regarding definiteness in indictments for crime. Nevertheless, if we read rightly the opinion of one of the Judges of the United States Circuit Court of Appeals, in our case, when the appeal from the interlocutory injunction order was before the Court, he justified the vagueness and indefininiteness of Section 4 of the Lever Act, on the ground that it was valid as a war statute, when it would have been invalid in times of peace. If this doctrine of distinction, as to the creation and punishment of crimes committed by private citizens not actively engaged in the military service, in time of war, and away from the scene of active military operations, is sound, Constitutional protection of life, liberty and property of such private citizens will, in times of war, have become entirely visionary.

While the Federal Courts, as well as State Courts, have not had frequent occasion thoroughly to examine, formulate and apply the so-called war powers of Congress, and numerous new avenues for the application of these powers have been opened by the recent World War, and it thus becomes important and vital, in the interest of permanent

Constitutional security, to weigh the questions presented by the present appeal, among others already before this Court, and others still to come, with the utmost care and profundity, to the end that no unnecessary inroads, into contemplated or established, principals of Constitutional law, be permitted or sanctioned for future use or abuse.

Fortunately, we are not wholly without some decisions and enunciations of principals by the Supreme Court of the United States, as well as by other courts, relating to these so called war powers of Congress, and their proper application and limitation. We desire to add to the full and able consideration, which this point will, doubtless, receive in other briefs, some further suggestions occurring to us in regard to the same.

At the outset, this Court, in the very recent case of *Hamilton vs. Py. Distilleries*, 251 U. S., 146, laid down the following principles, citing several prior authorities in support thereof:

> "The war power of the United States, like its other powers, and like the police power of the States, is subject to applicable Constitutional limitations."
>
> *Ex parte Milligan*, 4 Wall., 2.

The question then remains, whether a given statute, like the Lever Act, even considered as a war measure, violates constitutional limitations, fairly and properly applicable to the exercise by Congress of this war power.

We contend, that the innumerable articles which come under the heading of wearing apparel, and which include the wearing apparel of men, women, adults, children, and infants, constitute private property in every sense of the term, and property of a character not charged with any

public use, in the proper and recognized construction of that term, whatever possible elasticity of rule might be recognized as regards a general and homogeneous commodity, such as wheat, coal, sugar, or iron.

If we are correct in this claim, it next follows that such private property cannot be taken, except for public use, and then, only, upon just compensation. If such property cannot be taken for private use, obviously Congress cannot compel its transfer, even for full value, from one private individual to another private individual, which is the very thing that the Lever Act attempts to do, unless the owner accepts the only alternative of forever keeping his property, which might then, under some circumstances, expose him to the charge of hoarding it.

If the owner of private property is not obliged to part with it at all, as he is not, in the absence of hoarding, it is impossible to figure out any theory upon which he can be compelled to sell it at any given or regulated price, or for less than he is willing to accept therefor.

As stated, the justification for the present legislation is said to rest in the power granted to Congress by the Constitution, to declare war and to make all laws necessary and proper for carrying this power into execution.

We submit, most earnestly, that the war power of Congress, as related to the ownership of private property, is ample for all conceivable proper or necessary purposes, growing out of a state of war, when coupled with the further power existing, not only in time of war, but in time of peace, authorizing the government to take the private property of individuals for public use on paying just compensation therefor.

Under this power, Congress, could acquire all the wearing apparel in the United States, or as much thereof as was necessary, directly or indirectly, for the conduct of the war, pay the owners thereof its fair market value and then distribute it, by sale or gift, or as it saw fit, among its soldiers, officials, or, for that matter, civilians, whom it deemed should have it, by reason of their direct or remote connection with war activity, and no additional grant of power to Congress is proper or necessary to pass laws compelling private citizens to transfer their private property from one private individual to another, for a fair or reasonable rate or charge, or for any price whatsoever.

We call attention to some further authorities and considerations bearing on this very important topic, and which we respectfully urge, are applicable, alike, in times of peace or of war.

Since the abolition in England of the Statutes against engrossing, 12th George III., Chapter 71, freedom of trade and of the right to contract has been universally recognized in England as a fundamental principle of its law, and that principle was embodied in our own laws; and so it has never been thought that a trader could be prevented from selling to whom he pleased, from charging different prices to different persons and from charging as much as he could obtain.

As was said by Justice Peckham, in *U. S. vs. Freight Association*, 166 U. S. 319:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the articles in which he deals,

whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

In *People vs. Budd*, 117 N. Y., Judge Andrews said:

"That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however, common in rude and irregular times, are inconsistent with constitutional liberty."

War time prohibition was upheld because the states could, under the police power, abolish the manufacture and sale of liquor. Neither the States nor Congress may prescribe the charge or profit a merchant may make for his wares, because it is against due process of law and deprives him of his property without just compensation.

The Cases of *Munn vs. Illinois*, 94 U. S., 113 and *Budd vs. New York*, 143 U. S., 550, do not overrule the long cherished American conception, that the merchant, trader or manufacturer carrying on a private business may charge for his wares what he may obtain, or that he may refuse to sell to whomsoever he pleases, or that he may cease to carry on business at all.

In the Munn case, the Supreme Court merely stated a common law principle, that any business impressed with a public use, such as docks, warehouses and the like, were

proper subjects of regulation, for the reason that they are natural monopolies and the public must use them or be deprived of service.

On the other hand, in the retail clothing business, there is no monopoly. It is a private business, and, while it is true that everyone must wear clothes, no person is required to buy his clothes from any particular retailer. There are vast numbers of such retailers in every city, and it would be absurd to assert that a person desiring to purchase clothing would be unable to find a retailer who would sell him clothes.

Roughly speaking, it may be said, that one of the distinctions between a private business and one impressed with a public use, is the absence of any monopoly in the former; that is to say, the public are not required to deal with any one particular merchant or trader or with any particular group or limited number of merchants who control the trade in any particular place.

The doctrine of the *Munn* and the *Budd* cases is entirely in harmony with the common law and it has never been thought that these authorities have extended the doctrine of legislative control to private business. Nor has it hitherto been thought, that the business of dealing in the necessities of life in competition with others, is impressed with a public use, and it is respectfully submitted, that there is no power either in the State or in Congress to fix the prices of necessities when the same are sold in competition, either in times of war or of peace.

The following are pertinent excerpts from the argument of Jeremiah C. Black in the Supreme Court of the United States in the *Milligan* case:

> "It is precisely in time of war and civil commotion, that we should double the guards upon the Constitution If the sanitary regulations which defend the health of the city are ever to be relaxed, it ought certainly not to be done when pestilence is abroad. When the Mississippi shrinks within its natural channel and creeps lazily along the bottom, the inhabitants of the adjoining shore have no need of a dike to save them from inundation. But when the booming flood comes down from above and swells into a volume that rises high above the plains on either side, then a crevasse in the levee becomes a most serious thing. So in peaceful and quiet times our legal rights are in little danger of being overborne but when the wave of arbitrary power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.
>
> Nothing that the worst men ever propounded has produced so much oppression, misgovernment and suffering as this pretense of State necessity. A great authority calls it 'the tyrant's devilish plea', and the common honesty of all mankind has branded it with everlasting infamy."

In the Twelfth Edition of Kents' Commentaries, edited by Oliver Wendell Holmes, now a Justice of the U. S. Supreme Court, (Vol. 2, pp. 330-1, note b), Justice Holmes says:

> "The wages of labor and the prices of commodities and economy of dress were regulated by law in the earliest settlements of Massachusetts. * * * In 1778, there were acts of the legislatures of Connecticut and New York (and probably of other states) limiting

the price of labor and the products of labor, and tavern charges. The statute of New York was suspended in three months after it was passed, and repealed in the same year. * * * Such laws, if of any efficacy, are calculated to destroy the stimulus to exertion, but in fact, they are only made to be eluded, despised and broken."

In the same volume, Chancellor Kent says:

"The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society." (2 Kent Com. 318.)

In *Wilkinson vs. Leland,* (2 Peters U. S. 627, 657), Justice Story said:

"The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred. * * * We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power."

IV.

SECTION 4 OF THE LEVER ACT IS INVALID IN THAT IT DEPRIVES DEALERS IN WEARING APPAREL OF PROPERTY WITHOUT DUE PROCESS OF LAW BY DENYING TO THEM THE EQUAL PROTECTION OF THE LAW.

By proviso in this Section, farmers, gardeners, agriculturalists and others, with respect to products produced upon land owned, leased or cultivated by them, are exempt from its provisions and penalties.

It is difficult to perceive upon what grounds, this group of citizens who may be as guilty of so-called profiteering as are merchants or other dealers in commodities, whose origin can be traced to farms and agriculturists, can lawfully be exempted from the operations of the Act, and the Act enforced only against those not engaged in the exempted pursuits.

We respectfully contend that the above arbitrary classification is not within any of those sanctioned by the decisions of our courts, and therefore that such classification renders the statute void.

While Section 1 of Article XIV of the Amendments to the Federal Constitution prohibits a state from passing any law which shall deny to any person within its jurisdiction the equal protection of the laws, such a discrimination in a federal statute may well constitute the taking of property without due process of law in violation of the Federal Constitution.

Section 4 of the Act has already been held unconstitutional on this specific ground by Judge Anderson in the U. S. District Court in Indiana, in a coal case and his opinion will doubtless be before this Court in connection with the consideration of this question.

This point will, also, we understand, be fully considered and argued by counsel on other cases, and we, therefore content ourselves with the citation of the following authorities which we believe sustain our contention.

Connolly vs. Union Sewer Pipe Co. 184 U. S. 540.
International Harvester Co. vs. Missouri, 234 U. S. 199.

Caldwell vs. Texas, 137 U. S. 692, 697.
Giozza vs. Tiernan, 148 U. S. 657, 662.
McGehee on "Due Process of Law, p. 60.
Willoughby on the "Constitution," pp. 837-4.
Brushaber vs. Union Pacific R. R., 240 U. S. 1, 24, 25.

V.

THE DEFENDANT, U. S. ATTORNEY TRANSCENDED HIS AUTHORITY IN SECURING AN INDICTMENT AND THREATENING OTHERS, BASED UPON A SINGLE TRANSACTION, SUCH AS IS SET FORTH IN EACH OF THE SEPARATE COUNTS, WHETHER THE ACT IS CONSTITUTIONAL OR UNCONSTITUTIONAL.

The indictment in suit contains twenty separate counts all in the form of the sample count, attached to the bill of complaint, and each claimed to constitute a separate defense.

Taking the sample count for illustration, it is alleged that plaintiff made an unjust and unreasonable rate and charge, in that it sold one man's suit for $65.00 which it had previously purchased for $35.81.

We appreciate that the question of the sufficiency of an indictment is to be determined by the original Court of criminal jurisdiction under ordinary circumstances, but, as will be shown under a later point, equity will restrain a U. S. Attorney from enforcing a penal statute which is either unconstitutional, or even where he transcends his authority under a valid statute.

The Supreme Court, on appeal, will also consider the questions of law squarely involved as to whether a given interpretation of a statute, as distinguished from an inter-

pretation of an indictment, is constitutional or not, and obviously the form and substance of an indictment may conclusively disclose an attempted unconstitutional construction of a given statute even where such statute, if properly construed, would be constitutional.

The indictment in our case shows conclusively upon its face that it is based upon a construction of Section 4 of the Lever Act, to the effect that a person can be convicted of its violation upon the mere showing that he paid a certain price for a single article and sold it at a higher price, which, to a jury, appears to yield an unjust or unreasonable profit, irrespective of the expenses, losses and other contingencies of a given business.

Such a construction of the Statute, we respectfully contend, will involve depriving defendant of property without due process of law, in that it, in no event, allows to him the value of his property either at the time of sale or on October 22, 1919, when the amendment covering wearing apparel first went into effect, and in that it fails to allege further facts and elements which could, in any event, constitute a crime, under the Act, when properly interpreted; also be a violation of Article 1, Section 9, Clause 3 of the constitution, in that it would make of the law an *ex post facto* law, and also of the Fifth Amendment of the Constitution in that it would be taking from or compelling defendant to give up his property without just compensation; also violation of the Eighth Amendment to the constitution, in that, under such construction, excessive fines can be imposed on defendant and cruel and unusual punishment inflicted, where a defendant is an individual.

These considerations, also, bear upon those elements of unconstitutionality in Section 4 of the Lever Act, making it violative of the Constitutional inhibitions against the passage of an *ex post facto* law; for under the law, as formulated and as thus interpreted, the jury is permitted to determine what is a fair price for a given article which has been sold by the accused, and this finding and determination of a reasonable price must necessarily be subsequent to the time that the merchant sold the article in question. As the seller, thus, could not possible know or anticipate, what a given jury would regard as a fair price, the enforcement of the Statute by a jury subsequent to the sale of the article necessarily defines and creates the necessary elements of a crime for the first time, and after its alleged commission, and thus makes of the law an *ex post facto* one in the most acute and dangerous aspect of the situation and exposes citizens to the most vague and arbitrary evils of *ex post facto* legislation which can be conceived.

So, if a jury, subsequent to October 22, 1919, when the crime was first created, and at the time when, in any event, we maintain, a merchant was entitled to the market value of his property, can determine what is a reasonable and just selling price of a given article acquired by a merchant prior to that date and prior to when he had the right to sell at any price, such an interpretation of the law makes it clearly an *ex post facto* law, creating a crime of what theretofore was not a crime, and applying it to transactions having their inception prior to the time when the law creating the crime was passed.

The unreasonableness of a construction of the statute which would permit a prosecution to be based upon a single transaction is illustrated in the report of a recent accusation against a restaurant keeper for selling, for fifty cents, a club sandwich, the component parts of which, he had acquired for twenty cents, and against a restaurant keeper of charging fifteen cents for the service of a glass of milk, obtained for six cents.

When Congress intended that a single transaction should constitute a violation of the act, as in Section 25 of the Lever Act (relating to coal and coke) it said so in unmistakable language, as follows:

> "Each independent transaction shall constitute a separate offense."

The fact that Congress expressly applied this provision solely to the coal and coke section, shows its intent that the other sections should not be so construed.

The fallacy of a construction which would make a single transaction an offense may easily be discerned.

Two merchants, neighbors, sell coats, one from an advantageous purchase made a year ago, one from this year's purchases made on a rising market; the former may be selling a garment of superior quality at a lower price than the latter, and upon a construction of the statute, that a single sale may constitute an offense, violate the law, although giving to his patrons greater value for their money than his competitor.

A dealer might purchase a dozen men's suits at $20 each, and upon the sale of one suit at $40, upon the single sale construction, might be hailed into court and convicted of profiteering. The other eleven suits might hang upon the rack until the dealer sacrificed them at $15, each, and on the whole transaction he would be out $35.00 and be branded as a profiteer.

Nor is the situation of the defendant bettered, measurably, by an interpretation of the statute that the jury might allocate, as against the gross profit of a sale, a part of the overhead expenses of the business. The statute covers those who have no accurate or complete cost systems as well as those whose costs systems are adequate and complete. The statute and its construction must be the same for those without a cost system as for those with one.

If a single sale constitutes a violation of the statute, we may conceive of a jury sitting for days receiving evidence of the extent of the capital investment, of the fixed or funded charges, of the expense of rental, light, heat and advertising, of the services of clerks, bookkeepers, accountants, delivery men and porters, of the value to be placed upon executive direction, of the amount reasonably to be apportioned for repairs and replacements, of the calculations of potential risks and losses and the computations of actual losses, of the estimation to be allowed for depreciation and obsolescence, all in order that they might apportion to a particular sale, the amount to be deducted from the gross profit, which might not exceed one dollar on a single sale, to determine the justice or injustice of the net charge for the particular transaction.

Of the thousands of transactions which make up a retail merchant's business for a year, many are without even gross profits, and after an examination of all the elements mentioned and the allocation to the profitable transactions, of a portion of the overhead expenses of the business, how about the part of the overhead expenses which could not be met by similar allocations to profitable transactions and which, at the end of the year, might show a net loss, in which event, the merchant, having been called to court, on what the jury may have believed to have been too profitable transactions, might find himself at the end of the year both a convict and a bankrupt, and might have to be removed by habeas corpus proceedings from his prison cell to testify in his bankruptcy proceeding.

Indeed, as was pointedly remarked by Mr. Louis Thrasher, an able counsel of Jamestown, N. Y., in a profiteering case a merchant under the Lever Act is practically exposed, in fixing prices of his commodities to chose between state's prison and bankruptcy, and he may, indeed, find himself in both predicaments.

We submit, in the first place, that as a matter of elementary constitutional law, the Act could, in no event, be constitutional unless intrepreted as giving to the owner of any article of wearing apparel credit, at the outset, for the fair market value or replacement value of the article on October 22, 1919, as to all articles which he had on hand prior thereto, irrespective of the price at which he had acquired them, or whether they had been a gift to him, that being the date when it was, for the first time, made and created a crime to handle or deal in articles of wearing apparel at unjust or unreasonable rate or charge. Any other

construction of the law would make it clearly both an *ex post facto* law and one depriving such a merchant of his property without due process of law, and without just compensation and it requires no extended argument to establish these contentions.

The indictment, as has been shown, is based upon a construction of the statute, ignoring the market value of the articles at the time the crime was created, as well as at all other times and the U. S. Attorney is thus proceeding, and threatening to proceed under an unconstitutional interpretation of the statute, assuming that it is susceptible, at all, of a constitutional interpretation, which we challenge in any event and at all times, and is, therefore, exceeding his authority and making himself subject to injunctive restraint in a suit in equity.

Again, the construction of the statute conclusively shown by the sample count from the indictment necessarily involves a construction of the statute which will justify the imposing of excessive fines and cruel and unusual punishments.

The plaintiff, in common with other large retail houses makes many thousands of individual sales of wearing apparel in one year. It is indicted under the present indictment, for selling twenty separate articles at an unjust and unreasonable rate or charge, each count being alleged to constitute a separate and distinct offense.

If convicted on one of these twenty counts, it could be fined $5,000 on each count, aggregating $100,000 and one Federal Judge recently did fine a corporation in the central part of the State of New York $55,000 on conviction under eleven counts.

If the defendant were an individual, he could, in addition, be imprisoned upon such a construction of the statute, for two years under each count, or forty years on twenty counts, and so on, upon additional thousands of sales within a comparatively short period which would constitute cruel and unusual punishment.

Assuming, that the statute could, in any view, be regarded as valid, it can be given a reasonable construction as regards its application to a given business, so as, perhaps, to avoid unconstitutionality on the ground of its sanctioning excessive fines and cruel and unusual punishment.

Such a reasonable construction could, perhaps, be one to the effect, that a merchant shall not exact prices which will result in more than a reasonable return on his entire business for a reasonable period of time, such as a fiscal year, leaving to him discretion to fix the price on individual articles, based upon his experience and the expenses and exgencies of his business. In other words, he should be allowed a reasonable discretion as to his course of business and dealing; and a course of dealing during a reasonable period, resulting in excessive profits to him should constitute, at most, a single offense as distinguished from making the sale of each petty article a separate offense.

These considerations, indeed, have sanction in the language of the Act, itself, which both as originally passed and as amended, does not use either the words, sale, or sell, price or profit, the language being that a person shall not "make any unjust or unreasonable" rate or charge in handling or dealing in or with any necessaries.

The word "rate," itself, necessarily must have relation to charges on articles generally in a given business, and to the relation of charges or prices of one article compared with those of another dealt in by the same person and to the return or profits realized by a given person from his entire business during a reasonable period of time.

We submit, that the fair and reasonable construction of this language as it is, even if deemed sufficiently definite to be constitutional, under the Sixth Amendment of the Constitution, requires its application not to the sale of individual articles, but to the general conduct and outcome of a given business during a reasonable period of time.

In other words, it is not possible for a Court or Jury to determine whether a rate or charge is unjust or unreasonable in dealing in or with any necessaries unless the rates or charges made by the seller generally in his business are considered.

Criminal statutes must have a strict construction against the Government. If Congress intended to make individual sales at an unjust or unreasonable rate or charge criminal, it is to be presumed that it would have clearly so provided in these sections of the Act, as it did in others already mentioned under this point.

It cannot possibly be fair or reasonable that the innumerable petty sales of the retail business should be separately considered with a view of piling up penalties and periods of imprisonment under a penal statute or for any other purpose in determining whether a merchant's rates and charges are unjust or unreasonable, and such a construction of the statute before the Court makes it vulnerable to constitutional obligation on various grounds above mentioned, aside from its vagueness and indefiniteness, which, we, at all times, reiterate, make it void, irrespective of others.

The present point is aimed acutely at the enforcement of our contention that, if it is possible to give the Act a construction making it valid, the defendant U. S. Attorney and the Jury under his direction, have failed and refused to do so, but insist upon an unconstitutional construction and application of the Act.

VI.

SECTION 4 OF THE LEVER ACT IS VIOLATING OF THE TENTH AMENDMENT TO THE CONSTITUTION, RESERVING TO THE STATES OR TO THE PEOPLE ALL POWERS *NOT* DELEGATED TO THE NATIONAL GOVERNMENT.

Assuming that any power whatsoever exists to fix, regulate or limit the prices at which articles of private property can be sold, such power is clearly one that was never delegated or intended to be delegated by the states to the national government or Congress.

While Congress may limit charges for services connected with interstate commerce under the interstate commerce delegation of authority, such as interstate railroad rates, elevator charges, etc., it is clear that no such delegation of power has been made regarding the selling price of individual property owned by the citizens of the various states.

We appreciate, that this consideration does not necessarily dispose of the question, as to whether Congress has power to fix prices in the sale of commodities as a necessary incident of its war powers and during the continuance of a war.

We have urged, under another point that this power as applied to wearing apparel, is not necessary or proper for, nor incidental to the efficient exercise of the war powers delegated by the states to the Federal Government, and we call attention to the point now, as a separate proposition, to enforce our contention, that no such power to fix or regulate prices has been delegated to the Federal Government in times of official peace, and that, therefore, if the exercise of such power is not necessary for carrying into execution the war powers of the Federal Government, it exists neither in time of war nor of peace.

VII.

SECTION 4 OF THE LEVER ACT IS VIOLATIVE OF THE FUNDAMENTAL PROVISIONS OF THE CONSTITUTION DIVIDING THE GOVERNMENT INTO THE LEGISLATIVE, EXECUTIVE AND JUDICIAL DEPARTMENTS.

The making or regulating of prices or rates, either by the Federal or State Governments, where power so to do exists in interstate commerce or over public utilities or services or property rights charged with a public use, has been held to be legislative, although the legislative department may in proper cases prescribed general limitations and delegate to the executive department or to administrative commissions or officials the determination of definite charges, rates or prices within the limits prescribed by statute.

Such delegation as to particular rates and charges to be made within limits defined by statute cannot be delegated to the judicial department of the Government, whose sole

function is to interpret and enforce definite provisions of law which are in themselves either complete in the statute or made definite and complete by administrative officials to whom Congress delegated the power to formulate such definite figure within the statutory limitations.

Applying these principles to Section 4 of the Lever Act, we find that no limitations have been prescribed, either in the statute or in regulations or orders which the President was authorized to make.

It, therefore, necessarily follows, that there is delegated to juries, constituting an arm of the judicial department, the power to determine whether given rates or charges in the handling of necessaries are reasonable or unreasonable, just or unjust, and thus to perform clearly and exclusively legislative functions, in violation of the letter and spirit of the Federal Constitution.

VIII.

A SUIT IN EQUITY WITH A DECREE FOR A PERMANENT INJUNCTION AGAINST THE UNITED STATES ATTORNEY IS PROPER, WHERE HE IS SEEKING TO ENFORCE A CRIMINAL STATUTE WHICH IS UNCONSTITUTIONAL, OR IS TRANSCENDING HIS AUTHORITY UNDER A VALID STATUTE, AND PROPERTY RIGHTS ARE THREATENED.

The Government, as we understand its position, as disclosed in the Court below, maintains generally that a suit in equity, enjoining a U. S. Attorney from proceeding further with the enforcement of the Lever Act against defendant would not lie on general principles, and, more particularly because no property rights of the defendant are affected or threatened with injury.

Under the authorities in the Supreme and other Courts of the United States, such practice is sanctioned, where a penal statute is attacked on the ground of unconstitutionality, or the U. S. Attorney is transcending his authority under a valid statute, and its enforcement will affect substantial property rights of the defendant.

The question came up in recent cases in the U. S. District and Circuit Courts of Appeals, in the Second Circuit, arising under the War Prohibition Act.

These actions were brought by Breweries against the U. S. Attorney and the Collector of Internal Revenue, to restrain the former from prosecuting complainants, under said Act, and the latter from refusing to sell revenue stamps to complainants.

Judge Julius M. Mayer granted an interlocutory injunction order, during the pendency of the action against both defendants, from which the defendants took an appeal to the Circuit Court of Appeals.

The appeal from this interlocutory injunction order is reported in:

Jacob Hoffman Brewing Co. vs. McElligott, et al, 259 Fed. 525.

The Court there held,

> "A suit to enjoin a United States Attorney from instituting criminal proceedings under a Federal Statute is a suit against the United States, which cannot be maintained unless property rights are threatened with irreparable damage, and the Statute is either unconstitutional, or the Attorney is transcending his authority under a valid Statute."

The Court, in affirming the general rule that the United States cannot be sued either directly or by, or through a U. S. Attorney, however, recognizes the exception presented by our case in the following words:

> "There is, however, a well recognized exception to the rule, viz.: If property rights are invaded and the Statute in question is unconstitutional, it is void, is to be treated as non-existent, and so *no defense to the United States Attorney.* When instituting criminal proceedings under it, he is to be regarded not as representing the United States in his official capacity, but as acting individually." (p. 527).

And the Court further holds that the question whether the given Statute is unconstitutional must be determined in the injunctive suit, and if the act is held to be unconstitutional or the attorney exceeds his authority, the injunction will lie against a U. S. Attorney; if found constitutional the injunction will not lie, the Court using the following language on this point:

> "Obviously in such cases the constitutionality of the Statute, or the question whether the United States Attorney has transcended his authority, must be determined by the Court before it can determine whether the particular suit is, or is not against the United States." (p. 527-8).

The Court, in support of the above proposition, cited, *Ex parte Young,* 209 U. S. 123, and numerous other cases, all formulating the same distinction.

In *Jacob Hoffman Co. vs. McElligott, et al,* 259 Fed. 321, when that case came up before Judge Augustus M. Hand on a motion to dismiss the amended bill, which was denied, Judge Hand held that a suit in equity would lie

against a U. S. Attorney to restrain enforcement of a Federal Statute, alleged to be unconstitutional, to prevent a series of unauthorized prosecutions which may prove ruinous to persons in their property or business, the Court citing numerous authorities in support of this contention. This decision, we believe, correctly formulates the rules applicable to the situation in our case, and we invite the attention of the Court to the opinion of Judge Hand, and the authorities cited by him.

The question is, indeed, settled by decisions of the Supreme Court of the United States.

Hammer, U. S. Att'y, vs. Bagenhart, et al, 247 U. S. 251.

Wilson vs. New, 243 U. S. 332.

In the *Hammer* case, Bagenhart et al were complainants in the Court below and Hammer, U. S. Attorney, the sole defendant, and the suit was brought simply to enjoin the defendant from enforcing an Act of Congress intended to prevent interstate commerce in the products of child labor. The District Court held the Act unconsitutional, and an appeal was taken directly to the Supreme Court of the United States, which affirmed the judgment of the District Court.

In *Wilson vs. New*, the complainants were New and others, and the sole defendant, Wilson, U. S. Attorney. The District Court held unconstitutional the Act of Congress, known as the Adamson law, establishing an eight hour day for those engaged in interstate commerce, and on a direct appeal from the judgment, to the Supreme Court of the United States, this decree was reversed upon the ground that the Act was constitutional, and the bill dismissed on that ground.

It is perfectly clear, that the continuance of the prosecution under the indictments will affect seriously and irreparably the property, property rights and business of complainant in various ways. It will impair its credit with banks, and other creditors; injure its business and its good will by the effects of, and the publicity attending the trial; and, in case of an adverse verdict which could only be reversed after delay, on an appeal, will, in all probability, completely ruin its business, if not theretofore ruined, prevent its continuing to charge the prices for commodities which, if the Act be unconstitutional, it has a right to charge, in any event, and which it will have an absolute right to charge when the war is officially, as it has, for some time, been actually terminated, whether the Act be constitutional or not: expose it to new and further indictments for sales made since those which are referred to in the indictment, and thus harass it by a multiplicity of suits and prosecutions: and it appears from allegations of the complaint that the retail clothing business has been exceptionally dull for some time, owing to the profiteering agitation, the recent railroad strike, the movement for the general wearing of over-alls or old clothing; and that said prosecution, if allowed to continue, will in many other ways irreparably injure plaintiff in its property rights, and that the situation presented is one peculiarly for the intervention and protection of a Court of equity, by way of injunctive relief.

Judge Hand, in the *Hoffman* case, above cited, in speaking of the liberal construction to be given to a person's rights of property and business used the following language and quotations, entirely applicable to our case.

> "It is now well settled by the decisions of the Supreme Court that a Court of equity may restrain prosecuting officers either of a State or of a Federal

government, as well as other public officials, to prevent a series of unauthorized prosecutions, which may prove ruinous to persons, either in their property or in the business which is their means of livelihood. In the recent case of *International News Service vs. Associated Press,* 248 U. S. 236, the Supreme Court, in discussing the basis of equitable jurisdiction, pointed out that the term property is to be given a broad meaning, and said:

'In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right *** and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection, as the right to guard property already acquired.'"

Judge Hand, in referring to *Wilson vs. New*, above cited, used the following language again applicable to our case:

"When the Supreme Court entertained jurisdiction to enjoin criminal proceedings, that would substantially injure the railroads until the validity of the Adamson Law could be tested in a single suit, it must follow, I think, that a construction of the Act under consideration, (like ours, one of the War Acts) can properly be had in the case at bar, and the public prosecutor be stayed from prosecutions which would certainly enormously damage the complainant and others if the theory of the law, which both he and the Attorney General maintain is correct. *** Certainly if the prosecutions were instituted the damages would be irreparable and could not, so far as I am aware, be recovered in any form of legal action." (259 Fed., p. 329).

The Court of Appeals of New York, in a recent case sustained a suit in equity to restrain the Public Service Commission from compelling a Gas Company to adhere to a statutory maximum rate upon the ground that it was confiscatory, the Court through Judge Cardozo, saying, among other things:

> "There is protection against penalties that crush and against losses that cripple. • • • • Undoubtedly the plaintiff has some remedy as law. The decisive point is that it is not as complete or efficient as the remedy in equity. • • • • The very purpose of the suit is a declaration of the plaintiffs' rights, which enables it to shape its conduct in conformity to law. • • • • The situation may be summed up in a sentence: The plaintiff's business is menaced along converging avenues of attack. Equity intervenes to save it from impairment, if not destruction."
>
> *Municipal Gas Co. vs. Public Service Comm.*, 225 N. Y. 89, 102, 103.

We, therefore, deem it settled and established that, where the constitutionality of a penal statute is attacked, and substantial and irreparable injury is threatened to the property rights of a complainant by its enforcement, a suit in equity will lie against the prosecuting officer, as well as all other officials against whose threatened action, protection is sought, to restrain them from enforcing the same, in which suit, the question of constitutional invalidity is to be determined and, if the law is found invalid, permanent injunctive relief must be granted.

That the prosecution of the indictment against defendant will directly, seriously and irreparably damage plaintiff's property rights in case the act is held unconstitutional, may be demonstrated by an illustration wherein the present threatened prosecution is compared with threatened prosecutions in which unlawful and unauthorized action of a district attorney might not so directly affect property rights of a defendant as to warrant a court of equity in enjoining the same.

Suppose a United States attorney had a personal grudge against A, an individual engaged in the retail clothing business, and the Lever Act under consideration, as well as other criminal statutes relating to other subjects, whose validity was either questioned or unquestioned, were likewise in force, and the United States attorney should threaten A with indictment and prosecution under some other criminal act, such as counterfeiting or smuggling. While such a prosecution and the publicity attending the same might well in its indirect effect, ruin A's retail clothing business, it could be urged that this effect did not constitute so direct an injury or damage to A's property rights as to warrant the injunctive interference of a court of equity to restrain such prosecution.

In the present case, however, the prosecution and threat is aimed directly at the destruction of plaintiff's business and property rights, as the enforcement of the Act through criminal prosecution will necessarily deprive plaintiff of the right safely to sell his goods at such price as he may see fit and which right he has under the constitution, if the Lever Act, for any reason, is unconstitutional, and the injury to plaintiff's property rights, if the prosecutions continue, will necessarily be irretrivable and in many cases absolutely ruinous.

In other words, the threatened prosecution of plaintiff for selling goods at what the U. S. Attorney and the Grand Jury consider unjust and unreasonable rates and charges under the Act, which it is claimed is unconstitutional, constitute a direct attack on plaintiff's business, its right and ability to do business upon its own terms and upon its property and property rights.

It is indeed difficult to imagine or cite a threatened prosecution under an alleged unconstitutional statute which more directly affects injuriously the property rights of one accused of its violation than the present case, and if the equity jurisdiction ever exists to restrain such prosecution, under such circumstances, as it is settled it does, the present case is strikingly one for its application.

Our case is in fact much stronger, we respectfully contend, as presenting a threatened injury to property rights than any of the other cases above cited in the Supreme Court or in any of the other courts wherein the propriety of an injunctive suit in equity was sustained and sanctioned.

Judges Hough and Manton in the present suit on appeal from the order of the District Court denying a temporary injunction, held squarely that the present suit in equity would lie, if that Court had come to the conclusion that the Act was unconstitutional, but Chief Judge Ward of the same Court was of different opinion.

C. A. Weed & Co. vs. Lockwood, Fed.

In the recent case of *Ruppert v. Caffey*, 251 U. S., 264, the majority of the Justices of the Supreme Court found no difficulty as to the jurisdiction of equity, in case the act then under consideration should have been unconstitutional, and in sustaining the bill.

The Government suggested in the Court below, that an injunctive suit in equity would not lie against a U. S. Attorney after indictment found.

We respectfully submit that, even a superficial consideration of this objection, will demonstrate its fallacy. The cases granting injunctions have gone further than is necessary for our purpose, in holding that an injunction will issue even before indictment found upon a mere threat of a United States Attorney to present a case to a Grand Jury under an unconstitutional law.

Federal Judge Tuttle in his opinion in *Detroit Creamery Co. vs. Kinnane*, to be presented to this Court, in which case he enjoined the United States Attorney before indictment, found, said:

> "The commencement of various criminal prosecutions based upon alleged violation of the statutory provisions herein involved, clearly indicates the intention of the defendant District Attorney to attempt the enforcement of this particular provision of the statute, and shows beyond doubt the proprietory and necessity of the injunction sought. Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them, before invoking the equitable relief to which they are entitled, under the circumstances."
>
> *Vicksburg Co. vs. Vicksburg*, 185 U. S., 65.
>
> *Waite vs. Marcy*, 246 *U. S.*, 606 B."

If plaintiff is not required to wait until criminal proceedings are actually brought against it before invoking equitable relief, it is clear that, if he wishes to wait, so as to be certain that he is accused of a crime, it must be his privilege, as it may be to his advantage, so to wait.

Again, it would be quite absurd for a court of equity to insist that a given person should anticipate an indictment, when he believes himself to be innocent of crime, as he is presumed to be, under all circumstances, and is advised that a prosecution is not to be anticipated under a void and unconstitutional statute. Such a position taken by our courts would stimulate litigation, much of which would prove uncalled for.

Again, it was held in the *Jacob Hoffman Brewing Co.* case, 250 Fed. 527, and in other cases, that an unconstitutional statute is void, and is to be treated as non-existent, and, so, no defense to a United States Attorney, and that, when he is instituting criminal proceedings under it, he is to be regarded not as representing the United States in his official capacity, but as acting individually. It is thus clear, that, if the defendant is acting individually, and therefore unlawfully, he can be restrained at any juncture of his proceedings which will cause plaintiff further and irreparable injury to what may already have been done it.

An indictment found is the first official notification that a person can have that he is charged with crime, and if he acts promptly thereon, as plaintiff in our case did, not even having demurred to the indictment, as is admitted by the pleadings, he is doing all that can be reasonably expected of him in then seeking injunctive relief against further unlawful and illegal prosecution.

IX.

THE CONGRESSIONAL DEBATE AND STATEMENTS OF THE U. S. ATTORNEY GENERAL AFFORD ILLUMINATING EVIDENCE OF THE UNCONSTITUTIONALITY OF SECTION 4 OF THE LEVER ACT.

A suggestive side-light is thrown on the validity or invalidity of the Lever Act, and especially, on its amendment in October, 1919, under which amendment, the prosecutions in suit are being conducted, by the debates in Congress attending the enactment of this amendment.

A number of the ablest lawyers in the United States Senate took part in this discussion, and we beg leave to call attention to portions of the debate, showing that a number of the Senators considered the amendment, as finally adopted, unconstitutional, and sought to avoid this vital defect by the introduction of a further amendment creating Fair Price Committees, to fix prices in advance, as a guide to merchants, and that some of the Senators doubted the constitutional validity even of such Fair Price Committees. The more radical element, however, dominated, and not even this Fair Price Committee amendment was put into the bill, but only, so far as we are concerned in the present suit, the words "wearing apparel" were added and also severe penalties of fine and imprisonment created in connection with the prohibition against unfair and unjust charges or rates.

We quote the portions of this interesting debate as illuminating the subject and confirming our contention as to the unconstitutionality of the Act, and formulate the same in Exhibit "A", attached to this brief.

We desire, also, to call attention to certain extraordinary statements by the Attorney General made before the Committee on the Judiciary of the House of Representatives in April and May, 1920, when the committee was investigating the acts of the Attorney General, relating to the price of Louisiana sugar. Salient extracts from these statements of the Attorney General are literally quoted in "Exhibit B" heretofore attached.

A fair interpretation of the statements there made by the Attorney General is that the Department of Justice proposed to secure convictions of profiteers through the creation of a public sentiment and psychology which would be reflected in juries and result in convictions.

This position is certainly unique and amazing in a constitutional government where it has always been supposed that criminal convictions, if obtained, were to be the result of a calm, dispassionate consideration of the evidence by a Court and jury, alike removed from the influence or coercion of popular clamor, sentiment, pyschology, mental or other influence.

We invite the careful attention of the Court to these extraordinary statements made by the head of the Department of Justice of the United States, within the past few months, and long after actual warfare has ceased, although they are no more justified, in our humble opinion, by a state of war, than they would be in time of peace.

X.

THE DECREE OF THE DISTRICT COURT SHOULD BE REVERSED AND A FINAL DECREE IN FAVOR OF THE PLAINTIFF DIRECTED TO BE ENTERED.

Buffalo, September 20, 1920.

SIMON FLEISCHMANN,
EDWARD L. JELLINEK,
MARTIN CLARK,
JAMES O. MOORE,
JOHN W. RYAN,

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EXHIBIT A.

In the debate before the Senate upon the Bill (H. R. 8624), on September 10th, 1919 (Pages 5474 et seq.) a discussion arose between various Senators as to whether or not the Act as existing prior to the 1919 Amendment provided penalties for every offense defined within the Act.

* *

Mr. Kenyon: So that the main thing is, under Section 4, the fixing of an unreasonable price. While it is prohibited, there is no penalty attached to it; and the inquiry naturally arises, I think, to any lawyer, whether we can fix a penalty for an unreasonable price for something which is in no way connected with Interstate Commerce.

Mr. Norris: That may be a constitutional objection, but I do not care to go into it now—whether we had authority to pass the law or not—* * *

Coincident with the debate upon the Bill there were proposed amendments, one of which read: "And provided further, that to make unfair and unreasonable a rate or charge in handling or dealing in or with any necessaries, except where there has been a conspiracy, combination, or arrangement with reference to prices, such rate or charge must be in excess of the rate or charge fixed by a fair price committee, and the Department of Justice is authorized to provide for the appointment of fair price committees."

Senator Harrison in speaking of this amendment (page 5481), said:

It was intended to be placed there as a measure or as a standard whereby juries in arriving at their verdict could have something on which to base their verdicts. * *

It is quite true that the Attorney-General, when he appeared before the Committee on Agriculture and Forestry of the Senate, stated that these Committees in the various sections of the Country that have fixed prices under the licensing system have been requested to reorganize, and that they expected to organize these fair price committees all over the country, having thereon a representative of the consumers, a representative of labor, etc. * * * For my part, rather than leave it to a fair price committee all over the country to fix the price of necessaries and publish that price list in the paper and have it as a measure for the Jury to go by in arriving at its verdict, I would prefer to leave it to the Jury to ascertain all of the facts and pass upon the proposition of whether or not it was an unreasonable and exhorbitant charge. * *

Senator Kellogg asked:

"Do I understand that the Jury in each case, if this amendment were stricken out would decide what an unreasonable price was?

Mr. Harrison: That is the idea.

Mr. Kellogg: Suppose there were two retail dealers in the same town, charging the same prices who were both arrested and had separate trials, and that in one case the jury held the price was excessive and in the other case the jury held that it was not excessive; how is a man to know whether or not he is charging an excessive price?

Mr. Harrison: The fellow who is convicted in that case would be very unfortunate, but, I might say to the Senator that that is true in a great many instances. I have seen a man convicted by one jury and another man under the same set of facts turned loose.

Mr. Kellogg: Is it not a fact that the law must tell how far he may go so that the individual may know whether or not he is violating it?

Mr. Harrison: I would say to the Senator, in connection with that, that that is why the amendment known as the Smith Amendment gave the Attorney-General the power to appoint a fair price committee, so that prices might be fixed which could be taken as a standard. That is why that provision was included.

Mr. Kellogg: I understood the Senator was going to move to strike that out.

Mr. Harrison: I was going to move to strike it out, but I may say that the majority of the Committee was against my view on that proposition.

Mr. Dial: "Under this bill the people would be liable to be hailed into Court, prosecuted and tried upon an indefinite charge and under indefinite definitions of what profiteering is. I do not know what it is. What would mean profiteering to one person, would not appear to be profiteering to another person * * * it would result in having men hailed before a Court their reputation besmirched for some act that even the Courts did not know the definition of, and would never be told until after the jury passed upon it."

Senator Thompson, in continuation of the debate before the Senate on September 11th (page 5540) said:

"What criminal law can be relied upon, the application of which, both as to the law and the facts must be within the purview of a jury? I do not believe that the legislature has power—it ought not to have it—to legislate crimes by general language. A man ought to know or, at least be presumed to know if he has ordinary intelligence, from

the recitals of the Statute what he is doing when he commits a crime. An unreasonable rate is a good deal like a reasonable tooth ache--some man may bear a tooth ache that is much more severe than one which some other man could bear—or an unreasonable price for a suit of clothing or an unreasonable distance. The word, Mr. President, does not admit of specific definitions so as to apply and operate equally and justly in all cases. Therefore, I do not think, much as this legislation is needed, that we should enact in this general form of phraseology, under the operation of which John Smith may be guilty today of a violation of the Statute and John Jones, tomorrow, who charges the same price may be entirely exempt from its operation. That sort of legislation is not congenial to free institutions, and I do not think any reasonable court on earth would enforce it. * * * I have a general recollection that it is a fundamental principle in criminal jurisprudence that a defendant must know of what crime he is accused and that the crime must be one specified in the statute at the time of and before its commission.

Mr. Smith: There is a vast distinction, I think, between illegal conduct defined by the Sherman Anti-Trust Law to which the Supreme Court added the word "unreasonable" and a Bill which simply undertakes to define as a crime something which is unreasonable without further description. The feature of the offenses under the Anti-Trust Act was the illegal combinations. There were two elements of the offenses—illegal combination, constituing the offenses, and conspiracy to restrain trade. The Supreme Court added that it should have an unreasonable effect. But it was a definite act by the defendant with which he must be charged, outside of the supplementary feature of unreasonableness * * * I find no case or

at least I recall none, in which the mere charging of an unreasonable profit has ever been made a crime * * * (mentioning and recalling the facts and decision of Mr. Justice Brewer, in the Tozer case). * * *

In the further debate in the Senate upon this proposed amendment, on September 12th, 1919, (page 5620 et seq.) the following discussion took place:

Mr. Smith: I am not very enthusiastic about any kind of legislation which contemplates substituting artificial means in fixing prices for the ordinary course of business based upon supply and demand. Of course, I am in perfect sympathy with that legislation—and, if necessary, criminal procedure under it—which prevents illegal combinations or conspiracies to produce profiteering; but where legislation goes beyond reaching a combination to put up prices, I think as a permanent proposition we will do better if we let the ordinary competition in trade work out the prices, and stimulate more production to meet consumption. * * *

I desire to say that the claim that no existing provision is found in the food law for controlling profiteering, or for enforcing the provisions of section 4 of that law, is unfounded. The original bill was prepared with some care. Section 4 defines a number of acts as being illegal. Later on in the law, section 6 handles the problem of hoarding, defines it elaborately, and provides for its punishment. Sections 8 and 9 provide for the punishment of other things made illegal by section 4, but there was one thing made illegal by section 4 which at that time it was not deemed proper to make a crime. Section 4 provides that it shall be illegal to make an unjust and unreasonable rate or charge in the sale of a commodity. Now, this bill

adds to foodstuffs wearing apparel, and it is proposed to make it a crime to sell any foodstuffs or any wearing apparel at a price indefinitely described as 'unjust or unreasonable.'

What does that mean? What is the offense? When this bill was before the committee during the war and before the Senate, we did not think we should make that language a crime, or at least we did not undertake to do so; but in Section 5 the amplest means were given to enforce it. Under Section 5 the president was permitted to organize a system of licensing all lines of business engaged in handling foodstuffs, and to prescribe rules and regulations fixing the profits. Section 5 authorized the representatives of the President, whenever their rules and regulations as to profits were violated, to notify the parties so violating, and, unless they promptly complied after notice, the license to conduct business could be forfeited. To do business without a license was a crime. * * * If Section 5 had been enforced there would have been no occasion for additional legislation. We did not make it a crime to charge an unreasonable profit, because language of that kind cannot create a crime.

"It is too indefinite. It is too uncertain. Now, let us see what we would do if, with the bill extending to the sale of wearing apparel, we, without further language, make it apply to an unfair or an unreasonable profit or price. You hold up every merchant in the land. You hang over every merchant selling wearing apparel or selling food the doubt as to what is a fair profit. What is a reasonable profit? Here are two merchants just across the street from each other. One may have been unusually bright in his purchases and obtained his goods at a lower price than did his rival across the street. Must he undersell him? Must

he run him out of business? What is a reasonable profit? Mr. President, I am opposed to putting upon the statute books language so indefinite, and hanging the threat of criminal prosecution over the business men of this country, with no language of greater certainty to indicate to them what they are authorized to do.

"I call attention to the decision of Mr. Justice Brewer in Fifty-second Federal Reporter, in which, where prosecution and conviction had been had against certain men under a statute which defined as a crime as unreasonable preference, without further language, Judge Brewer held:

> 'In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty.'

"Therefore we have added an amendment which is now subject to objection. The amendment which the committee added was that to make unjust or unreasonable a rate or charge in handling or dealing in or with any necessaries, except where there has been a conspiracy, combination, or arrangement with reference to prices, such rate or charge must be in excess of the rate or charge fixed by a fair-price committee, and the Department of Justice is authorized to provide for the appointment of fair-price committees.

"Mr. President, the amendment offered by the Senator from Iowa (Mr. Kenyon) limits the application of that doctrine, as I understand it, to a place where there is a fair-price committee, so that if there is no fair-price committee at the locality you can prosecute a merchant, charging him with having made an unreasonable profit, indict him for it, and take him up on a warrant, without giving

him any standard whatever as to what is a reasonable profit. I can not vote for the amendment of the Senator from Iowa, because I really do not believe in making criminal at all so indefinite a charge as that one has made an unreasonable profit.

"I agree with the view of Judge Brewer that such language is too indefinite to constitute a crime. The case in the Fifty-second Federal Reporter was before the Supreme Court on one occasion, and while they neither affirmed it nor over-ruled it they discriminated the case then before the Supreme Court from the case ruled on by Judge Brewer. I regard it as too indefinite, and am opposed to such language attached to a crime. I am opposed to making criminal conduct any language so uncertain that every man engaged in business is left in doubt as to what are his rights, and as to whether he is complying with the law or violating the law.

"I do not desire to discuss this subject elaborately. I wish to state my views, and to call attention to the fact that the original act, as it now stands, gives ample opportunity to prevent profiteering, to prevent unreasonable charges. Unfortunately, again I repeat, we did not create a commission to administer the law. If we had, it would have been administering the law now. * * *

"I do not believe the Senate as a whole, if it really voted upon it, would vote in favor of making a crime out of the term 'unreasonable or unfair.' I do not believe if the attention of the Senate is called to the fact that with the provisos beaten they are passing an act hanging over the head of every merchant in this country the possibility of criminal indictment, without telling him what constituted the offense, it will vote for it. I can not believe the Senate

will vote for it. I think they will beat the whole thing if their attention is called to it, especially when they see that Section 5 provided a full measure of relief, without making criminal so indefinite a charge.

Mr. Kenyon: Mr. President, I do not like this proposed legislation. I do not think anybody is very enthusiastic about it. It is difficult legislation. If it was to be permanent legislation, it would not secure my vote. But the Attorney General has come to Congress, and the President has done so, asking for this legislation. It is only going to be a period of perhaps 30 days, and in the meantime the Attorney General may be able to accomplish something by it That is the only justification that I can get into my mind for voting for it." • • •

Mr. Smith: My object is to hinder prosecution, and to prevent prosecution where a merchant has no standard from which he can tell what is a violation of the law. I simply do not believe that we ought to turn loose upon the merchants of this country an act which will make it criminal to charge an unreasonable or an unfair profit without in any way indicating to the merchant what is a reasonable or fair profit. I regard such a description of an offense as too indefinite to be fair to the men engaged in business throughout the country.

Mr. Smoot: I sympathize with the Senator's position, but I believe that adding the words suggested by the Senator from Iowa will be held to mean that there may be nothing to it at all.

Mr Smith: I would rather there should be nothing to it at all than what the unrestricted language would mean; but let me just make this suggestion to the Senator from Utah. If there were a community in which profiteering or extortion was taking place, then there could be a fair-price

committee named at that place, and that fair-price committee could fix the standard; and if a merchant charged no more than that standard, he would be free from any danger of prosecution. I think, under the bill as it would stand with the proposed amendment, that there would be a great many communities in which no prosecutions could be conducted, and I do not think they ought to be conducted there. I do not think they ought to be conducted anywhere without giving a merchant more definite information as to what we mean shall constitute a crime than the simple declaration that he is charging an unfair or unreasonable profit.

Mr. Smoot: If I thought this legislation was going to be enforced in the United States very many months—I do not mean a year, I mean months—I never would support it. I never would vote for such a bill as this if I thought that; but, really, if we are going to do a thing, let us do it. If it is bad, let it be bad and do not let us try by putting in some words to make it a perfectly useless thing.

Mr. Kenyon: The Senator is not quite right about making it perfectly useless. Here is a community, we will say, that has no fair-price committee. Gouging and profiteering are going on, and the Attorney General is trying to get at it. They take the matter up with the Attorney General, and he arranges for one of these committees. Then they are in a situation to stop it. If the profiteering is not bad enough in the community for them to take it up with the Attorney General, then nobody will be particularly hurt. It will accomplish it, if this kind of a law can accomplish it. I have a great deal of sympathy with what the Senator says, and if this were for years, or even many months, I would not support it; but I am supporting it now merely as an emergency measure.

EXHIBIT B.

The following statements of the Attorney General will be found in an official pamphlet, entitled "Investigation of the Action of the Attorney General, Relating to the Price of Sugar. Hearing before the Committee on the Judiciary, House of Representatives, Sixty-sixth Congress, Second Session, on House Resolution 469, Serial No. 21, Part 4, April 29th and 30th, May 1, 1920," at pp. 148, 149, 150, 161:

"Attorney General Palmer. In order properly to understand the attitude of the Department of Justice and the conduct of the Attorney General and the United States attorneys under his supervision and direction in this matter, it is necessary to go back to the time when the Lever Food Control Act was amended by act of Congress, providing a penalty for profiteering. • • •

And in order that the committee may have the benefit of the attitude of the Department of Justice and of the Attorney General from the beginning, I want to call your attention to what was said at the hearing before the Committee on Agriculture of the House when this amendment was being considered by that committee.

The amendment was drafted by me. The President, in his message to Congress of August 8, 1919, had recommended that the food-control Act should be amended, so as to include wearing apparel among the necessaries of life which were protected by that act, and that a penalty should be provided for profiteering, which was then made unlawful in section 4 of the act. • • •

I accordingly drafted an amendment to the food-control act providing for a penalty for profiteering, and including

wearing apparel, and some containers among the necessaries of life protected by that act.

Obviously, Mr. Chairman, it would have been very much better if some system could have been devised which would have made the act against which Congress was proposing to legislate a crime very much more definitely and specifically defined. But we were in the midst of a serious situation. The cost of living had increased to the point where it was a serious burden upon the backs of the people.

The committee tentatively did prepare a price-fixing plan, which I protested against, and which I urged the committee not to adopt, both on the ground that it was bad in policy and in principle to place upon the Executive the power to fix prices of the necessaries of life, and also because it was impractical in its operation and impractical as a matter of legislation to accomplish the reform as soon as it was needed. * * *

Having thus objected to the plan of the Agricultural Committee which contemplated Executive price fixing, and having asked simply for a penalty against the charging of an unjust and an unreasonable rate, I was challenged, in effect, by the Committee on Agriculture to state how it would be possible to administer and enforce such a law as I was advocating. * * *

On page 78 of the hearings before the Committee on Agriculture of the House of Representatives, on the amendments proposed to the food-control act, August 15 and 20, 1919, there appears this report:

> 'Attorney General Palmer: You do not in section 4 give the Executive the right to consider the fairness or unfairness of such prices. You declare what is unlawful; that is, the charging of unfair and discriminatory, and unjust and unreasonable rates; and that leaves it as a question of fact for the jury.

Let me tell you how we propose to operate that—and, to my mind, it is the only practical method. There are two ways by which it could be done, I suppose. One is your suggestion—having a price fixed in advance by some Government agency; you say, by the President. • • • • •

I think that is impracticable. • • •

The other method is this: When a man makes an unjust and unreasonable charge, or a discriminatory and unfair price, hale him into court.

And our method, or our proposition, to determine to the satisfaction of a jury what is a fair and reasonable price, is this: We have called upon the former State food administrators, not to organize their food administration, but simply to organize in the cities and counties fair-price committees, which we have asked to be composed of a wholesaler, a retailer, a representative of labor, representatives of housewives and representatives of the general public. • • •

These fair-price committees are being organized in all the larger cities and counties of the country, and they are making and will make investigations which will apply to that community only.

Now, their findings are not law; their findings do not fix the price. Their findings will simply present to us the same opportunity for gathering the evidence to show what is an unjust and unfair price for that article, and if we bring a man into court who has sold at a higher price than they have announced as a fair price, we can produce the same evidence that they have to convince a jury that that man is a profiteer, and if a committee of representative citizens of that character says that these men are profiteers they will not sell at that price in that community, or if they do the jury will convict them, because the same kind of sentiment will be represented in that kind of committee that is represented on a jury.' • • • •

And it was for this second purpose, announced when this law was being considered—a part of the very purpose in framing and passing this law—that it made it possible, if the price announced by the various fair-price committees was exceeded by a dealer, for the Department of Justice to *dump into the lap of a jury* the same evidence which convinced the representative men upon the fair-price committee; and we worked upon the assumption that that evidence would likewise convince the representative men in a jury box in that community, and that a conviction would follow.

The psychology of it was that the dealer knew that the jury would take the same position as a fair-price cimmittee. The dealer knew that, if he exceeded that price, he was up against the sentiment of his community, and that sentiment would be reflected in the jury box, as it was reflected in the fair-price committee. And he did not exceed these prices. And that was done, I say, in every city of the country."